

# **THE IMPACT OF OVERCROWDING ON PRISONERS' RIGHTS**

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**ADVA BRIVIK**

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I hereby declare that I have read and understood the regulations governing the submission of the LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ADVA BRIVIK

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Student Number: BRVADV001

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# **THE IMPACT OF OVERCROWDING ON PRISONERS' RIGHTS**

## **1. Introduction**

Democratic South Africa is one of the most violent societies on the planet. Crime statistics<sup>1</sup> report that there were 52, 733 reported cases of rape in 2004, and 260, 082 cases of assault with intent to inflict grievous bodily harm in that same period.

A necessary consequence of such alarming crime statistics has been the increase in debate into crime control. The South African public, now weary of the seemingly unstoppable crime wave, are calling for a strong handed justice system to help deal with the problem. Retributive justice, a morally questionable practice at the best of times, is arguably the foundation for such a public call for a stronger justice system. It is the hope of these people that through the reception of 'just desserts' for their actions, criminals will be sufficiently punished for their crimes, whilst at the same time acting as a necessary deterrent to would be offenders thinking of taking up crime as their chosen vocation.

The problem is that, most times, the means of sufficient punishment takes the form of sentencing the offender to jail time. Whilst this placates the public, by creating a false sense of security in knowing that the offenders have been taken out of the community the result is often that the offender becomes more educated in crime and hardly rehabilitated. This form of vengeance can not be accorded the same

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<sup>1</sup> Crime Information Analysis Centre –South African Police Service – Crime in the RSA for a period April to march 1994/1995 to 2003/ 2004 available at [http://www.saps.gov.za/statistics/reports/crimestats/2004/\\_pdf/crimes/rsa\\_totals03\\_04\\_new.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2004/_pdf/crimes/rsa_totals03_04_new.pdf) (accessed on 6 January 2006). It is however noted that the number reported murder cases have dropped to 19 824 from 25 965 in 1994.

weight under the South African Constitution<sup>2</sup>, which is explicitly confirms the fundamental basic human rights entitled to all.

After all, it is the Constitution that stresses the need for understanding but not for vengeance, a need for reparation but not for retaliation and a need for *ubuntu* but not for victimization<sup>3</sup>. These themes are on par with international law which came about as a result of two devastating world wars, where there was a widespread of denial of civil rights and liberties and routine and systematic detention and torture of prisoners. It was not until 1975, however, that the United Nations General Assembly adopted its landmark declaration on the 'Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment'<sup>4</sup>, which set the standard of treatment towards inmates.

Therefore when the drafters of the South African Bill of Rights, having learned from other democratic countries, world history and its own, it took the time to spell out, what is entailed to an extent as unusual, if not unique the recognition of the fundamental human dignity of all prisoners and well as human rights<sup>5</sup>. Prisoners' rights in general and definitions are explicitly set out in Chapter 3 of the Constitution under the heading 'Custody of all prisoners under conditions of Human Dignity' which provides an interpretative framework for the whole Act.

It is for this reason that the right to human dignity is so emphasised in Chapter 10 of the Bill of Rights and found in the Constitution of South Africa, and again, its link with the s35 (2) rights of inmates. The s10 right to dignity and s12 right to freedom and security of person, including the right not to be treated in a cruel, inhuman or degrading

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<sup>2</sup> Constitution of the Republic of SA (Act No. 108 of 1996) adopted in 1996, hereafter referred to as the "Constitution"

<sup>3</sup> Preamble to the Constitution of South Africa 1996

<sup>4</sup> Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment GA res 9 December 1975

<sup>5</sup> Van Zyl Smit, "Swimming Against the Tide" at 227

way are both relevant in determining the appropriate conditions of incarceration. The basic constitutional standards for a detainee's conditions are specifically guaranteed in subsections 35 (2)(e) which provides that all detainees including every sentenced prisoner, has the right to '*conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment*'<sup>6</sup>.

The annual report of the Judicial Inspectorate of Prisons indicates that the state frequently fails to meet these constitutional standards and this failure does not correlate with the infrequency with which section 35 (2) rights appear in the law reports<sup>7</sup>. The few that have made their way into the law report, have been monumental in the plight of inmates to ensure that their time in prison is served under better conditions. However, the battle has not yet been won and prisons are not yet on par with the standards set by the South African Constitution and International Treaties.

A particular right which has subtly avoided being addressed is that, as noted above, of 'adequate accommodation'. The reverse of that, ie overcrowding is the current realities of prisons today. It goes without saying that this results in gross human rights violations.

This dissertation will focus on the effect of overcrowding of inmates in prisons, showing that due to Government policies, a self defeating cycle is in place whereby instead of leading to the reintegration of prisoners, the prison system is actually creating more problems for the society that it is trying to protect. The situation has not suddenly appeared overnight and a brief discussion as to the complicated history of South Africa's penal system, specifically up until the end of white minority rule in 1994, is necessary.

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<sup>6</sup> Section 32 (2) (f) of the Constitution

Further, this dissertation intends to look at South African law as well as well as international treaties. Following on from this a case by case look at inmates' rights, this relates to both those that have been sentenced and those awaiting trial, and ensuring that they are invoked. Despite legislative support for the protection of inmates' rights the situation at present is clearly unacceptable and as such, various reasons for this will be explored, including the problems surrounding minimum sentence legislation, the ability of correctional services to deal with court challenges and overcrowding and HIV/AIDS. Lastly, after a discussion of South African and international case law on the matter, with a review of the viability of the various alternatives to imprisonment.

Finally, the common misconceptions that are often based on feelings of victimisation, whereby "*people are sent to prison as punishment and not for punishment*"<sup>8</sup> will be clarified.

The rights discussed here, are those of all inmates, whether entirely innocent or guilty of an offence. They are the rights inherent in dignity (in the sense of value or human worth) of every human being<sup>9</sup>.

It is further noted that Section 35 of the Constitution defines and differentiates between an 'arrested, detained and accused person'. For the purposes of this dissertation, and unless this text shows clearly a different intention, the terms 'prisoner', 'inmate', 'sentenced prisoner' and 'awaiting trial prisoner' (used separately or together) should be taken as referring to any persons who are so positioned as to be unable to remove themselves from the ambit of official action and abuse<sup>10</sup>.

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<sup>7</sup> Iain C & De Waal J *The Bill of Rights Handbook* 5<sup>th</sup> ed 2005 at 773

<sup>8</sup> Van Zyl Smit as cited in Liora Lazarus, *Contrasting Prisoner's Rights*, Oxford: Oxford University Press, 2004 as cited in *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa*, Johnny Steinberg, January 2005.

<sup>9</sup> Rodley, Nigel S *The Treatment of Prisoners under International Law* ed 2 1999 at 6

<sup>10</sup> Ibid.

## **2. The Rights of Prisoners under South African Law**

As torture and forceful imposition of power were commonly used to both intimidate and as a means of obtaining information, inmates were often excluded from the outside world and denied family and medical assistance<sup>11</sup>. They were subject to these conditions either within a cell or in isolation for days on end. However, it has come to the attention of the public and prisoner's rights activist that although some of these wrongs have been addressed, and are explicitly prohibited in law, other deprivations still exist, namely, the right to adequate accommodation.

South African courts of the post-apartheid period have indeed followed the trend of the international realm and have responded to the plight of individual prisoners living in poor conditions with a great deal of sympathy. The Courts ensure that at least most of those rights are invoked. This was seen in the judgment handed down by the Supreme Court of Appeal when they confirmed that:

*"... the public might feel particularly unsympathetic towards prisoners ... we cannot dispense with the essential values that make us a civilised society. We are bound by the values entrenched in our Constitution<sup>12</sup>."*

The Bill of Rights furthermore protects everyone's right to human dignity, and everyone's right to freedom and security of the person. In *Makwanyane*<sup>13</sup> Chaskalson P said that:

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<sup>11</sup> Rodley, Nigel S *The Treatment of Prisoners under International Law* ed 2 1999 at 11

<sup>12</sup> Minister of Correctional Services and Others v KwaKwa and Another 2002 (1) SACR 705 (SCA) at para 28

<sup>13</sup> S v Makwanyane and Another 1995 (3) SA 391 (CC)



*“Dignity is inevitable impaired by imprisonment or any other punishment, and the undoubted power of State to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner’s dignity. But a prisoner does not lose all his or her legal rights on entering prison”<sup>14</sup>.*

He then proceeded to say the following:

*“A prisoner is not stripped naked, bound, gagged and chained to his or her cell. The right of association with other prisoners, the right to exercise, to write and receive letters and the rights of personality.... are of vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world, and are subject to prison discipline. Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three, subject only to limitations imposed by the prison regime that are justifiable under section 33. of these, none are more important than section 11 (2) right not to be subjected to “torture of any kind.. nor to cruel, inhuman or degrading treatment or punishment”. There is no difference between encroaching upon rights for the purpose of punishment and destroying them altogether<sup>15</sup>”.*

In this case, interesting references were drawn from the German Federal Court, namely that while the right to human dignity demands a humane carrying out of a sentence, it does not prevent the state from protecting the community from dangerous criminals even if this

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<sup>14</sup> S v Makwanyane and Another 1995 (3) SA 391 (CC) par- 142

<sup>15</sup> Ibid.

meant incarcerating them for life<sup>16</sup>. The German court further held that the law must provide for some prospect of parole for a prisoner sentenced to life long imprisonment who had become rehabilitated during his sentence. This was the view followed by South Africa in that it is a violation of the right to dignity to banish a convict to a cell without giving that person some hope of release after a length of time, and where there is proof that the convict has been rehabilitated<sup>17</sup>.

Among the provisions in the South African Constitution is the right of “everyone who is detained, including every sentenced inmate, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment<sup>18</sup>”.

In a White Paper tabled in Parliament during 1991 the mission of the then Department of Prisons was broadened as follows<sup>19</sup>:

*‘to promote community order and security by exercising control over, detention of and dealing with prisoners and persons under correctional supervision in the most cost-effective and least restrictive manner’.*

The aim of the above mentioned paper is to focus on the treatment of inmates in prisons, and in the community of probationers under correctional supervision. It hopes to bring South Africa in line with international trends by generating community involvement in correctional matters and to introduce alternative sentencing options to

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<sup>16</sup> The Bill of Rights Handbook, Human Dignity Chapter 10 at 10.3-10.4

<sup>17</sup> Ibid.

<sup>18</sup> Section 35 (2) (f) South African Constitution

<sup>19</sup> Department of Justice and Correctional Services, South Africa. White Paper on the extension of the mission of the Department of Correctional Services and the implementation of correctional supervision as an alternative sentencing option. (WPD- 91) 1991

curb the ever rising influx of inmates into already overcrowded prisons.

## **2.1 The Standard Minimum Rules<sup>20</sup>**

Legislation is officially committed to a policy that aims to make prisons more humane than they were under apartheid, with a view to rehabilitating offenders and reinserting them into society. This is in conformity with the spirit of one of the world's most liberal constitutions and also draws reference from the International Standard Minimum Rules for the Treatment of Prisoners, which will be briefly explored<sup>21</sup>.

The Standard Minimum Rules cover three fundamental principles<sup>22</sup>:

- All prisoners shall be treated with respect due to their inherent dignity and value as human beings;
- There shall be no discrimination on the grounds of, *inter alia*, race, sex, religion, ethnic origin; and
- The prison system is afflictive by the very fact of the removal of one's liberty and should not, therefore, result in any further derogation of one's rights except those essential for the achievement of a lawful purpose.

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<sup>20</sup> Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

<sup>21</sup> Ibid.

## 2.2 Inmates Rights under South African Law

Having had the benefit of learning from the experiences of other jurisdictions and history, the drafters of the South African Constitution compiled a list of rights that each inmate is entitled too. Those rights are clearly listed in section 35 of the Constitution. The following is a breakdown of those rights and how they have been enforced over time and what they entail in practice.

### a. Information to and Complaints by Prisoners<sup>23</sup>

Among other new initiatives introduced through the 1998 Act<sup>24</sup>, in the last five years is the establishment of independent oversight of prisons through the Independent Judicial Inspectorate headed by an inspecting judge. This office was established in 1998, and is mandated to inspect the state of prisoners and attend to their complaints.

On 19 February 1999, the following sections of the Act were put into operation<sup>25</sup>.

- Sections 83 and 84 established the National Council for Correctional Services. This is formed by the Minister appointing two judges, a regional magistrate, a director of public prosecutions, two members of DCS, a member of SAPS, a member of the Department of Welfare, two

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<sup>22</sup> Report of the National Prisons Project of the South African Human Rights Commission, Human Rights Commissioner Legal & Educational Officer. Rhoda Kadalie and Ron Paschke, 24 February 1997

<sup>23</sup> Section 35 (2) (a) *“to be informed promptly of the reason for being detained”*; section 35 (2) (b) *“to choose, and to consult with, a legal practitioner, and to be informed of this right promptly”*; section 35 (2) (c) *“to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”*; section 35 (2) (d) *“to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released”* South African Constitution

<sup>24</sup> Correctional Services Act 111 of 1998

<sup>25</sup> Ibid

persons with special knowledge of the correctional system and four or more representatives of the public.

- Sections 85- 94 established the Judicial Inspectorate.

The current inspecting judge is Mr. Justice Fagan, who has prioritized the reduction of the prison population and was the instigator of a wave of early prison releases in 2000<sup>26</sup>.

The Judicial Inspectorate is also charged with the appointment of independent prison visitors<sup>27</sup>, who are not necessarily professional judicial or prisons personnel. One or more members of the IVP are appointed for each prison, to make regular visits, interview prisoners and deal with the complaints of prisoners by reporting the complaints to the Head of Prison and monitoring the way that they are dealt with.

The administration of a sound and effective request and complaints system forms the basis of an orderly prison community. Prisoners in South Africa are therefore afforded the opportunity to lodge complaints and requests daily to the Head of the prison. Each request and complaint is recorded. Prisoners also have access to their legal representatives, to family and friends (either through by correspondence or visits), to the Ombudsman, and to visiting magistrates and Supreme Court judges to name a few<sup>28</sup>.

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<sup>26</sup> Dissel A and Ellis S, Reform and Stasis: Transformation in South African Prisons -Paper first published in "Ambitions réformatrices et inertie du social dans les prisons sud-africaines", Critique Internationale No. 16, July 2002, also found at <http://www.csvr.org.za/papers/papadse.htm> (accessed on 6 June 2005)

<sup>27</sup> Independent Prison Visitors hereafter referred to as "IVP"

<sup>28</sup> On 8 July 1992, a formal agreement was entered into with the International Committee of the Red Cross to visit South African prisons.

b. Separation of Categories

Different categories of prisoners are classified and kept separate, subject to sex, age, criminal record, legal matters, etc. categorisation in prisons has no bearing in race as was traditionally the case.

b. Accommodation<sup>29</sup>

Based on the security classification, prisoners are allocated to maximum security, medium security and minimum security institutions.

b. Adequate reading material<sup>30</sup>

This should include at the very least, recent newspapers.

c. Adequate medical treatment

Legislation provides that every prisoner has access to medical doctor assigned to care for the health requirements of each of the inmates. The medical practitioner must be assisted by sufficient nursing staff according to the number of inmates at the prison. Dental services are also provided, usually on a semi-permanent basis as dictated by the need.

Every inmate must be medically examined on admission, on transfer before release and whenever a sick report is made or when the medical practitioner finds it necessary to examine an inmate. Inmates may also be referred to private medical practitioners outside the prison wall, it is no strange sight to see prisoners under escort at day clinics, at general hospitals and

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<sup>29</sup> Section 35 (2) (a) “to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment” Constitution of South Africa

<sup>30</sup> Ibid.

consulting rooms of medical practitioners specialising in the various medical fields. In the case of *Van Biljoen*<sup>31</sup>, Brand J ordered that an HIV-positive prisoner be given access to antiretroviral drugs at state expense, despite the fact that the same treatment was not available to indigents at a state hospital outside of prison.

His ruling was based partly on the common law *residuum* principle<sup>32</sup>. He went on to say that outside of prison, a civilian would be able to earn an income, or alternatively receive aid from their employers in order to afford the medication. As the latter option is not available to an inmate, denying the prisoner of same would be inconsistent with South African common law principles.

d. Adequate Nutrition<sup>33</sup>

A balanced and varied diet in sufficient quantities is a minimum requirement. Practicalities would probably make it impossible for a detainee to prescribe the content of the daily menu. Exceptions should be allowed in the case of, for example, a vegetarian or someone requesting Kosher or Halaal food. Using human dignity as a standard, a person should not be forced to eat in a way infringing his or her dignity.

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<sup>31</sup> *Van Biljon and others v Minister of Correctional Services and others*, 1997 (4) SA 441, SALR, 441-460

<sup>32</sup> The Correctional Services Act 111 of 1998 gives expression to a common law principle first stated in 1911- the *residuum* principle. It refers to the basic rights and liberties retained by a prisoner of an ordinary citizen except those taken away by law expressly or by implication and those necessarily inconsistent with the circumstances in which the prisoner was placed. It finds a clear statement in the dissenting Appellate Division opinion handed down by Corbett JA in *Goldberg and others v Minister of Prisons and others*, AP 1979 (1), SALR, 39D-E.

e. Exercise and Sport<sup>34</sup>

Adequate opportunity must be provided for prisoners to participate in sport and recreation. The value of this programme in an environment of strict discipline and monotonous activity is very important.

Sadly, the state of affairs in South African prisons is such, that the inmate usually only gets about an hour per day out of their cells for such activities.

f. Discipline and Punishment

According to the Standard Minimum Rules, discipline and order shall be maintained with firmness but with no more restriction the necessary for safe custody and a well ordered community life.

h. Religion

The Standard Minimum Rules stipulate that if an institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. In South Africa, the chaplaincy service of the Department of Correctional Services acts mainly in a facilitating role and faiths and churches primarily take the responsibility for the religious care of their followers in prison. For this reason 1723 preachers and lay preachers are accredited visitors to South African prisons, representing nearly every faith and

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<sup>33</sup> Section 35 (2) (a) “to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment” South African Constitution

<sup>34</sup> Section 35 (2) (a) “to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment” Constitution of South Africa



religion or church in South Africa. This is yet another very vital and important community involved service that is rendered to inmates as well as being another important contact opportunity with the outside world.

i. Inspection of Prisons

The regular inspection of prisons is embodied in the Standard Minimum Rules as well as in South African legislation. The main purpose of inspection is to ensure that prisons are being managed in accordance with the existing laws and regulations to achieve the aims of penal and correctional services. South African prisons are indeed inspected regularly as a result.

It is noted that the problem of overcrowding has not yet been addressed in South African Courts. It is further conceded that although overcrowding is not the only cause of concern within South African prisons, as this paper will show, it is definitely a root of evil.

### **3. International and Humanitarian Law**

Principles of international law can be said to some degree to have stemmed from Humanitarian law, which is much older and consists of a vast body of law dealing with almost all aspects of modern armed conflict. For this reason, reference to Humanitarian Law is important when dealing with the question of inmates rights, because it creates legal precedents thus setting a standard of care<sup>35</sup>.

International law in this area has come about through a number of treaties, established as a result of many wars on both an international and internal level.

Provisions dealing with the conditions of the sick and wounded as well as the care of inmates of war have become matters of concern in international law. This has laid the foundation for various legal developments and has made a major contribution to the process whereby the protection of the individual has become the concern of international law and respect for human rights in general has been engendered<sup>36</sup>.

These are highlighted in the affirmations which can be found in international instruments, namely the International Covenant on Civil and Political Rights<sup>37</sup>, the European Convention for the Protection of Human Rights<sup>38</sup> and Fundamental Freedoms and the African Charter on Human and Peoples' Rights<sup>39</sup>, which all prohibit various forms of punishment.

Humanitarian law has also become a branch of the law concerning human rights. In fact human rights have come to provide the basis for humanitarian law. The differences lie in that, human rights relates to basic rights of all human beings everywhere, whereas humanitarian law relates to the rights of particular categories of human beings – the sick, the wounded and inmates of war during periods of armed conflict.

The basic rules of international humanitarian law have been developed over a period of about 150 years since the 1864 Geneva

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<sup>35</sup> Rodley, Nigel S *The Treatment of Prisoners under International Law* ed 2 1999 at 6

<sup>36</sup> Human Rights in the World Robertson (1972) also found at <http://butterworths.uct.ac.za> (accessed on 6 June 2005)

<sup>37</sup> Article 7 of the International Covenant on Civil and Political Rights prohibits “*cruel, inhuman or degrading treatment or punishment*”, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>38</sup> Article 3 of the Convention (1950) provides: ‘*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*’.

<sup>39</sup> Also known as the Banjul Charter on Human and People's Rights. Article 5 prohibits. ‘*cruel, inhuman or degrading punishment*’, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

Convention<sup>40</sup>. The Department of Correctional Services now incorporates safe custody and the treatment of offenders within the confines of the prison setting partly as a consequence of these international principles.

However, legal developments of the rights of inmates can be traced back to 1688, when United Kingdom in its Bill of Rights outlawed cruel and unusual punishment, setting a universal standard as to how inmates are to be kept in detention<sup>41</sup>. These protections have been adapted and can now be found in several countries' constitutions, such as United States of America<sup>42</sup>; Canada<sup>43</sup>; indirectly Australia<sup>44</sup>, as well as the Constitution<sup>45</sup>.

In fact, nearly every modern state either proclaims such a principle in its Constitution or Penal Legislation<sup>46</sup>. An example of the latter can be found in the Swedish State Report that states, '*According to the Act (1974): 203 on institutional treatment of offenders, a convicted prisoner shall be treated with respect for his human dignity*'<sup>47</sup>.

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<sup>40</sup> The 1864 Geneva Convention was inspired by Henri Dunant (the founder of the International Committee of the Red Cross). Geneva Convention Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 *entry into force* 21 October 1950

<sup>41</sup> "The United Kingdom is the forerunner of the many modern states with written constitution" Wm & Mary, Sess 2 ch. 2 as cited in Constitutional Jurisprudence and Proportionality, D Van Zyl Smit 1995.

<sup>42</sup> Eighth Amendment of the Constitution of the United States of America, Constitution of the United States of America adopted by convention of States, September 17, 1787; Ratification completed, June 21, 1788, Ibid. United States of America hereafter referred to as the "USA"

<sup>43</sup> Section 12 of the Constitution of the Canadian Charter of Rights and Freedoms Constitution Act, 1982, Ibid.

<sup>44</sup> The English Bill of Rights of 1688 forms part of the Australian constitutional fabric. See Murphy J. in *Silver v The Queen* (1981) 55 A.L.J.R 509 at p 513. Ibid

<sup>45</sup> Section 35 (2) (e) of the Constitution of South Africa

<sup>46</sup> *Imprisonment Today and Tomorrow, International Perspectives on Prisoners' Rights and Prison Conditions*, Second Edition. Edited by Dirk van Zyl and Frieder Dunkel, 2001

<sup>47</sup> Sweden State Report, U. N. Doc CCPR/ C/ 1/ Add 9, at 10. Footnote cites of State reports are intended merely to provide the reader reference to a State report or two which contain a statement or condition illustrative of the one expressed in the text. The footnote is not intended to be an exhaustive list of every State which has made such a declaration or statement. Ibid

There are a few States which do not contain such an explicit statement in any form of law<sup>48</sup>. However, such States invariably explain, “the law is based on the recognition of, and respect for, human dignity and presupposes this fundamental idea”<sup>49</sup>.

Other international efforts to create standards for the rights of inmates is the 1996 conference which was attended by delegates from 40 African states in order to adopt the Kampala Declaration on Prison Conditions in Africa. The Declaration is supported by the Kampala Plan of Action. This declaration read together African Charter on Human & Peoples’ Rights (1981) is binding on its signatories which include South Africa. The Kampala Declaration makes the following affirmations of principle<sup>50</sup>:

- That the human rights of inmates should be safeguarded at all times ...;
- That inmates should retain all rights which are not expressly taken away by the fact of their detention; and
- That inmates should have living conditions which are compatible with human dignity.

The principle enunciated in the Kampala Plan of Action is that “*the success of a prison system is measured by the security it offers society and the degree to which the treatment it provides rehabilitates offenders...*”<sup>51</sup>.

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<sup>48</sup> Austria State Report , U. N. Doc CCPR/ C/ 6/.Ibid

<sup>49</sup> Ibid.

<sup>50</sup> Kadalie R and Paschke R, Report of the National Prisons Project of the South African Human Rights Commission, Human Rights Commissioner Legal & Educational Officer, 24 February 1997

<sup>51</sup> Ibid.

It follows that there are other factors surrounding the detention of an inmate which may lead to cruel, degrading unusual punishment. Namely, when sentenced to an overcrowded cell the inmate is forced to adopt means of survival which often leads to violence. This coupled with the constant looming fear of attack by another inmate puts the inmate in a state of unnatural stress. These, amongst other prevalent factors within the overcrowded cell amount to the type of punishment which is clearly prohibited by law as mentioned above.

#### **4 South Africa's Prison History**

A brief look at South Africa's history sheds some light, as to why the situation in prisons is in such dire need of attention. This chapter will explore the initial reasoning's for the building of prisons, and how it became a place convenience to take Black South Africans out of society under the Apartheid Regime. As a result, the prisons became fuller.

Until the 18<sup>th</sup> century, prisons were primarily used as a means of detention, mainly for prisoners awaiting trial, for safe custody and as a way of collecting debts rather than as places of punishment<sup>52</sup>.

The standard form of punishment of the time was frequently flogging, fines, the pillory, deportation (in Britain) and execution. The term of imprisonment became a more popular phase as the punishment of criminals slowly became more humane<sup>53</sup>.

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<sup>52</sup> The History of Prisons available at [http://www.pmnw.co.uk/history\\_prisons/](http://www.pmnw.co.uk/history_prisons/) (accessed on 6 January 2006)

<sup>53</sup> Pollock J M '*The Philosophy and History of Prisons*' Texas State University available at [http://www.jbpub.com/downloads/0763729043/Chapter\\_01.pdf](http://www.jbpub.com/downloads/0763729043/Chapter_01.pdf), (accessed on 2 June 2005)

## 4.1 Pre-Apartheid

By the time the (old) National Party came into power in 1948 the prison system was a major supplier of reliable unskilled black labour for the mines<sup>54</sup>. In 1959 parliament officially abolished prison labour, replacing the practice with policies that prescribed “useful and healthy outdoor work” for short term prisoners. The practice continued until as late as 1989<sup>55</sup>. It was also during this period that the treatment of prisoners reflected the separatist ideology of the apartheid regime, as was being played out in the South African society as a whole. The penal system played an important role in maintaining this social control through racial segregation over the population<sup>56</sup>. As a result Black and white prisoners were thus separated from one another and received different treatment<sup>57</sup>.

On the one hand, the system was used to deal with “ordinary” criminal activity (such as murder, rape, theft and assault) and the other social phenomena thought to be a threat to the morals and well being of the Afrikaner-Nationalist state (such as sex work, drug use, and the free expression of sexuality). On the other hand, the system was also pressed into service to ensure the enforcement of the apartheid legislation (such as the Group Areas Act<sup>58</sup> and pass laws) and to control and suppress political dissent and resistance to the apartheid regime (through the application of “security” legislation and common-law prohibition against treason). Apartheid as a government regime was widely recognised as having been largely an exercise in

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<sup>54</sup> Van Zyl Smit 1991 15 as cited in Prof. Pierre de Vos “Prisoners Rights litigation in South Africa Since 1994: A critical evaluation” University of the Western Cape. Civil Society Prison Reform Initiative (“CSPRI”) Research Paper Series No. 3, November 2003, also available online at [www.nicro.co.za/cspri](http://www.nicro.co.za/cspri) (accessed on 2 June 2005)

<sup>55</sup> Van Heerden, Prison Health Care in South Africa (1996) UCT as cited in Ibid

<sup>56</sup> “A Brief History of Prisons in South Africa” Monograph 29- Correcting Corrections October 1998, published by the Institute of Security Studies, accessed at <http://www.iss.co.za/Pubs/Monographs/No29/History.html>, as cited in Prof. Pierre de Vos “Prisoners Rights litigation in South Africa Since 1994: A critical evaluation” University of the Western Cape. Civil Society Prison Reform Initiative (“CSPRI”) Research Paper Series No. 3, November 2003, also available online at [www.nicro.co.za/cspri](http://www.nicro.co.za/cspri) (accessed on 2 June 2005)

<sup>57</sup> Dissel, A “Tracking Transformation in South African Prisons”; Kollapen 1 as cited in Ibid

<sup>58</sup> See Group Areas Act of 1950

classifying, mapping and assigning different populations, on the basis of 'race' and ethnicity. The running of prisons in South Africa was highly politicised and was viewed as having strategic importance, as it assisted in incarcerating the perceived enemies of the regime. From this, people were designated to areas with their own legal and administrative norms. Millions of people were forcibly removed to places of residence determined for them by state officials. Punishment of those who failed to respect this system involved a range of corporal punishments, formal and informal, and the construction of a penal system<sup>59</sup>.

Many South Africans who would not have found themselves on the wrong side of the law in a more democratic society were therefore sent to prison.

Towards the end of the 1970's the government became increasingly preoccupied with security. Things changed even more with the coming to power of Prime Minister and later State President P. Botha. Under Botha, the state security apparatus grew and states of emergency were prompted by violence and continued intermittently throughout the 1980's. This resulted in the government becoming increasingly dominated by Botha's circle of generals and police chiefs.

Botha's years in power were marked by numerous military interventions in the states bordering South Africa and by an extensive military and political campaign. Within South Africa, vigorous police action and strict enforcement of security legislation resulted in hundreds of arrests and bannings certain political parties<sup>60</sup>.

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<sup>59</sup> Dissel A and Ellis S, Reform and Stasis: Transformation in South African Prisons- Paper first published in "Ambitions réformatrices et inertie du social dans les prisons sud-africaines", Critique Internationale No. 16, July 2002, also found at <http://www.csvr.org.za/papers/papadse.htm> (accessed on 6 June 2005)

<sup>60</sup> History of South Africa in the apartheid era, Wikipedia found at <http://en.wikipedia.org/wiki/history> (accessed on 6 June 2005)

One such group of detainees were those referred to as ‘political prisoners’. They were arrested for crimes, such as being a member of an illegal organisation in terms of security legislation. Often conditions under which these prisoners were held were not determined by the prison authorities but by the security police.<sup>61</sup>

Unlawful arrests and the like occurred frequently, despite international pressure which brought the General Assembly of the United Nations. The United Nations in 1973 together agreed on the *International Convention on the Suppression and Punishment of the Crime of Apartheid*<sup>62</sup>. The aim was to apply sanction on South Africa in order to persuade the South African Government to change its policies.

However, it wasn’t until the late 1980s, when the change finally occurred. This began with the removal of all reference to race in law and discriminatory legislation changed<sup>63</sup>. The prisons law was amended in 1993 when solitary confinement and punishment on a spare diet were abolished, as was corporal punishment for prisoners.

## **4.2 Post Apartheid**

South Africa now has a prison system controlled by one national body, the Ministry of Correctional Services, administered by the [Department](#)

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<sup>61</sup> History of South Africa in the apartheid era, Wikipedia found at <http://en.wikipedia.org/wiki/history> (accessed on 6 June 2005)

<sup>62</sup> Article II of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with article XV defines Apartheid “as including similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”.

<sup>63</sup> See the Prohibition of Mixed Marriages Act (1949) and the Immorality Act 1950



of Correctional Services<sup>64</sup> and governed by the Correctional Services Act 111 of 1998<sup>65</sup>.

Structurally the new 1998 Act is a complete departure from its predecessor, the 1959 Prisons Act<sup>66</sup>, (renamed the 1959 Correctional Services Act) with the emphasis on the rights and duties of prisoners rather than on the system required to handle them.

## **5 The Influence behind South African Legislation**

The transition of the 1990s offered to South Africans an opportunity to reshape their views on crime, punishment and treatment of offenders. The incoming government and all those South Africans that supported the change recognized the need to rectify the political situation. The new Government was a reflection of the spirit of South Africa's first post-apartheid government, led by the African National Congress<sup>67</sup>. The ANC embarked on a nation building project consciously predicated on the creation of a culture of human rights. The new project involved a number of reforms such as the incorporation of international human rights law into the Bill of Rights of the 1996 Constitution and the setting up of an array of new bodies such as the Human Rights Commission and the TRC<sup>68</sup>.

The new bodies of law had a significant influence on the current legislation. For example, while the previous Prisons Act 1959 provided for the appointment of medical officers and left details of the medical service to be provided to the regulations, Section 7 of the new Act specifies the rights that all prisoners have to medical treatment. The duty of the state to provide such treatment is therefore established

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<sup>64</sup> Department of Correctional Services hereafter referred to as "DCS"

<sup>65</sup> Correctional Services Act 111 of 1998

<sup>66</sup> Prisons Act (Act 8 of 1959)

<sup>67</sup> African National Congress hereafter referred to as "ANC"

<sup>68</sup> Truth and Reconciliation Commission hereafter referred to as the "TRC"

with the organisational detail of how it should be done still left up to subordinate legislation.

Moreover, the minimum rights relating to matters such as accommodation, hygiene, clothing, and bedding, exercise, health care, contact with the community and religion, belief and opinion may not be violated for disciplinary or any other purposes.

An opportunity presented itself in 1995, to apply the idealistic intentions of the drafters of the constitution against the social realities the country faced at the time. In 1995, the Constitutional Court was asked to decide on the constitutionality of the death penalty. In the case of *S v Makwanyane and Another* 1995, the two convicted were sentenced to death.

The court decided on whether the death penalty in terms of s 277(1)(a) of the Criminal Procedure Act 51 of 1977 was in conflict with the provisions of the Constitution Act 200 of 1993 (the interim Constitution). The court found that due to a lack of substantive empirical evidence to show that the death penalty would serve as a deterrent to crime, it felt there was no justification to allow for it.

Chaskalson P. said that imprisonment is a severe punishment but prisoners retain all the rights to which every person is entitled under [the Constitution] subject only to limitations imposed by their prison regime<sup>69</sup>. It was held that, amongst other breaches in fundamental rights, that the death sentence infringes the right not to be subjected to cruel, inhuman or degrading treatment or punishment in s 11(2) of the Constitution Act 200 of 1993.

In the decade following this judgment changes in philosophy and law relating to imprisonment have been very dramatic.

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<sup>69</sup> *S V Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) at 142.

## **5.1 Minimum sentence Legislation**

Minimum sentence legislation was initially regarded as an emergency measure, to combat the emergence of serious crime in South Africa. The legislation was only meant to be in effect for a period of two years from the 1<sup>st</sup> May 1998, but contained a provision that it can be extended by the President with the concurrence of Parliament, -which it was.

It might be argued in Parliament's defense that it was not thinking of the long term effects that such legislation could have caused because it did not envisage the mandatory minimum sentencing provisions lasting beyond the initial two year period. Critics of Minimum Sentence Legislation often make the accusation that the implementation of such legislation has more to do with placating public opinion, after the abolition of the death penalty, than upholding justice<sup>70</sup>. Whereas the Constitutional Court has firmly laid out its intention to rise above the pressures of trying to appease public opinion<sup>71</sup> in favour of the Constitutional text<sup>72</sup>, the legislative and executive spheres of government, whose existence relies upon public participation, has been more eager to meet public pleas for tougher measures against convicted criminals.

This is a worrying feature of South Africa's new democratic society, which is now regarded as one of the twentieth century's most outstanding examples of a democratic transition and has deep implications for both politics and for prisons. On the one hand, there is a persistence of a very high level of crime and on the other hand, this has created great political pressure for the government to address this issue. The Government's reaction to reigning public opinion has been to commission a new generation of maximum- security prisons,

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<sup>70</sup> Judicial Inspectorate of Prisons- Office of the Inspecting Judge Prisons & Prisoners- Annual Report 2004/2005

<sup>71</sup> *S v Makwanyane and another* 1995 (3) SA 391 (CC)

to increase the security levels at all existing prisons, and to renew the controversial minimum sentence legislation which in turn fuels a growth in the number of sentenced prisoners by increasing their duration of stay. The result of this is gross overcrowding within South African prisons.

As such the minimum sentence legislation, aimed at ensuring that ‘the punishment fits the crime’, has led to longer prison sentences overall which, places the correctional facility under a serious strain from a lack of resources. The Judicial Inspectorate of Prisons, in his annual report<sup>73</sup> as to the state of the prison system, records that of the 240 prisons in South Africa there are 187 446 inmates currently being housed<sup>74</sup> out of which 52 326 are awaiting trial<sup>75</sup>. The problem lies in the fact that these prisons were built with the intended capacity of only 114 000 inmates.

As a result, this leads to terrible conditions resulting in both deprivations of basic human rights, and “cruel, inhuman or degrading treatment or punishment”<sup>76</sup>.

## **5.2 Minimum Sentence legislation Statistics**

In another article by Justice Fagan<sup>77</sup> the following shocking statistics were recorded:

- Sentences of 7 years and less showed little change from 1997 (67 535) to 2004 (67 483), while sentences of more than 7 years increased rapidly from 1997 (29 376) to 2004 (67 081).

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<sup>72</sup> The Constitution of South Africa

<sup>73</sup> Judicial Inspectorate of Prisons – Office of the Inspecting Judge Prisons and Prisoners – Annual Report 2004/2005

<sup>74</sup> Ibid

<sup>75</sup> More the 50 000 awaiting- trial detainees ranging in age from 13- 84, have prison stays lasting from months to years. Only two out of every five would end up being convicted. “Bleak future for jailed youngsters” Cape Times 18 August 2005.

<sup>76</sup> Article 3 of the European Convention on Human Rights, (adopted in 1950 and put into effect in 1953 by the Council of Europe).

<sup>77</sup> “Our Bursting Prisons” The Advocate April 2005

- Life sentences increased- showing that 5745 prisoners were serving life sentences as at 31 January 2005 compared to 5 511 on the 30<sup>th</sup> September 2004 and 4 460 in September 2003<sup>78</sup>.

It is no coincidence that in April 1998, immediately before the implementation of the minimum sentence legislation, only 18 644 (19%) of the sentenced population were serving a term of longer than 10 years. This has since increased substantially to 49 094 (36%). Overall the sentenced prisoner-population has increased by 28 801 prisoner since April 2000 to September 2004, despite 7000 prisoners being released on parole in September 2003. Despite the argument that police are just being more efficient in capturing criminals thus leading to more people being sentenced by the courts to prison sentences, however the evidence does not support this.

Between 1991 and 2000, the number of prosecutions actually dropped by 23%, with the number of convictions dropping by 19%<sup>79</sup>. There is little evidence to show that these numbers would have reversed so dramatically in the last five years<sup>80</sup>.

Based on the ever-growing numbers and the obvious correlation between the minimum sentence legislation and sentencing, Justice Fagan concludes that the overcrowding in prisons can be directly attributed to minimum sentencing<sup>81</sup>. With a growth rate of more than 7000 prisoners per year being added to an already over-stretched system, there can be little doubt as to the inevitable decay of the conditions facing prisons.

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<sup>78</sup> Judicial Inspectorate of Prisons – Office of the Inspecting Judge Prisons and Prisoners – Annual Report 2004/2005

<sup>79</sup> Institute for Security Studies, "Criminal Justice Monitor" Steinberg J op cit note 8.

<sup>80</sup> Johnny Steinberg "Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa" Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005.

<sup>81</sup> "Ghastly Prison overcrowding presents huge problems" Without Prejudice May 2005 at 22-23

### 5.3 Legal Challenges to Minimum sentence legislation

The first legal challenge to the minimum sentencing regime came before the Supreme Court of Appeal, in the case of *Malgas v The State*. In his judgement, Marais J.A. noted that,

*"when conceived [the provisions] were intended to be relatively short-term responses to a situation which it was hoped would not persist indefinitely"*<sup>82</sup>.

The provisions, however, were subsequently renewed by Parliament and during April 2005 it was agreed that the President may, by proclamation, extend section 51 and 52 of the Criminal Law Amendment Act<sup>83</sup> for a further two years with the effect from 1 May 2005. The decision was taken despite impassioned pleas from many within the justice system that it should be abolished<sup>84</sup>.

This legislation mandates sentences for several crimes including premeditated murder, the murder of a law enforcement official, multiple rapes, gang rape and the rape of a minor.

The legislation also mandates minimum sentences for, among other crimes, robbery with aggravating circumstances, car-jacking, drug trafficking, the smuggling of ammunition, firearms and explosives, rape, and the indecent assault of a child. Judges and magistrates must impose not less than the prescribed minimum sentence unless there substantial and compelling circumstances to justify a lesser sentence<sup>85</sup>. Bail was also made more difficult to obtain by section 4 (f) of the Criminal Procedure Second Amendment Act 85 of 1997.

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<sup>82</sup> S v Malgas 2001 (2) SA 1222 (SCA), at para 7.

<sup>83</sup> Criminal Law Amendment Act 105 of 1997

<sup>84</sup> "Ghastly Prison overcrowding presents huge problems" Without Prejudice May 2005 at 22-23

<sup>85</sup> Fagan JJ, Inspecting Judge of Prisons "Our Bursting Prisons" Advocate April 2005 at 33-35

Two constitutional challenges to the 1997 mandatory sentencing laws have come before the courts, namely *Maglas v The State*<sup>86</sup>, in the Supreme Court of Appeal, as mentioned above, and *The State v Dodo*<sup>87</sup> heard before the Constitutional Court. Both courts have been at pains to ensure that the grounds for departure from the mandatory minima are interpreted in such a way that the sentencing courts have the scope to impose sentences that are not constitutionally disproportionate to the crime<sup>88</sup>.

Quite significantly in the latter case, Ackermann J. explicitly stated that the proportionality of a prison sentence in relation to the crime committed must be judged, among other things by "*the conditions under which it is served*"<sup>89</sup>.

As such a statement could be seen as a positive step towards the Constitutional Court tackling the issues of prisoner's rights to adequate floor space, the Court as a whole failed to make a connection between the law it was approving and the capacity of the state to house prisoners under constitutionally admissible conditions.

Perhaps the Court, long holding the position of deference to legislative decisions in the interest of separation of powers, felt it was not in a position to rule on the overcrowding which is a politically sensitive subject. Whatever it's intentions, the connection between sentencing regimes and the constitutionality of prison conditions is not intended to be a secret, but rather it is a matter explicitly engaged by public policy. It seems as though the question of the relationship between sentencing regimes and conditions of imprisonment has fallen off the South African judicial radar.

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<sup>86</sup> S v Malgas 2001 (2) SA 1222 (SCA)

<sup>87</sup> S v DODO 2001 (3) SA 382 (CC)

<sup>88</sup> Van Zyl Smit "Swimming against the Tide" at 242

<sup>89</sup> S v DODO 2001 (3) SA 382 (CC), para 36.

Indicative of this were the results of a survey conducted in 2000, 42 Magistrates and High Court judges from around the country were asked whether the capacity of the correctional system to carry out sentences was considered when they imposed them; 80% of respondents said never or almost never, while 10% of respondents said always or almost always<sup>90</sup>.

This shows of the reluctance of judges to make use of their discretion as provided to them by legislation to impose a lesser sentence when they consider the circumstances to be “substantial and compelling”.

Justice Fagan says that the use of imaginative and more positive sentencing requires a large element of “guts”<sup>91</sup>.

He cites two cases where judges used their discretion<sup>92</sup>. The first was heard in the Cape division before Judge-President John Hlophe. Judge Hlophe imposed an eight-year sentence instead of a life sentence on a grandfather of 78 who had raped his 11-year old granddaughter. The judge cited the fact that at the age of 86 years he may not be alive and, in any event, would be unlikely to commit such a heinous crime again<sup>93</sup>.

The second example was found in the judgment of Judge Classen, who had experienced difficulty in getting several men, well respected in the business community, to pay maintenance to their ex-wives. He offered them the legal alternative of spending time (weekends) in jail. The resultant compliance of the men in question to now paying

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<sup>90</sup> Schönteich M, Mistry D and Struwig J *Qualitative Research Report on Sentencing: an empirical, qualitative study on the sentencing practices of the South African criminal courts*, with a particular emphasis on the Criminal Law Amendment Act 105 of 1997, South African Law Commission Discussion Paper, May 2000.

<sup>91</sup> “Ghastly Prison overcrowding presents huge problems” Without Prejudice May 2005 at 22-23

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.



maintenance is a case in point as to the effectiveness of judicial discretion.

## **6. Overcrowding**

Despite seemingly obvious human rights violations and extensive empirical evidence indicating the negative psychological and physiological effects that overcrowding has on prisoners, for instance, it is degrading, overcrowding retards rehabilitation and is conducive to creating more criminals. The courts in this country have so far been reluctant to make a ruling that would allow for an overhaul of the deficiencies in the system. On the issue of overcrowding and adequate floor space no definitive constitutional ruling has yet been handed down as to what should be constitutionally acceptable. Judges have chosen so far to link the question of adequate floor space to a variety of other prisoner rights issues such as:

- How much time do prisoners spend in their cells each day?;
- Do they receive adequate exercise, nutrition and recreation?;
- Do they have access to adequate ventilation and natural light?;
- Do prisoners have sufficient access to health services and rehabilitation?<sup>94</sup>.

Thus failing to tackle the direct question as to the constitutionality of overcrowding and solutions thereto.

Overcrowding in prisons is blamed on the flawed operation of the criminal justice system starting from the arrest through to sentencing of an offender, along with the governing legislation<sup>95</sup>, and with the failure to deal with the root of the problem as to why crime occurs in

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<sup>94</sup> Steinberg J, op cit note 8

the first place. As a result, both sentenced and awaiting- trial prisoners are sent to cells, which on average are designed to accommodate 25 inmates, but in reality house as many as 55.

After a visit to one prison on the 12<sup>th</sup> May 2004, Judge Bozalek graphically wrote of the shocking conditions he witnessed, namely that:

*“... they (the cells) are grossly overcrowded.. the facilities are outdated and unhygienic. There is no mess hall where the prisoners can eat and the toilets which they use are inside the cells and stand open. As a result the prisoners eat, sleep and perform their basic bodily functions in small overcrowded cells. Furthermore it appears that apart from their hour-long exercises each day conducted in the concrete courtyard and when the prisoners attend a parade or fetch their food to be brought back to their cells, they spend the entire day locked in their cells...”<sup>96</sup>*

When the drafters of South Africa's interim Constitution decided to include a clause specifically guaranteeing the human dignity of prisoners, they were, no doubt, looking backwards at the apartheid era that had just passed. It was common cause that prison conditions under apartheid were horrendous — particularly for the black inmates. Nelson Mandela's dictum, penned a year after the interim Constitution was passed into law, stated that, *“no one truly knows a nation until one has been inside its jails<sup>97</sup>”*, captured the spirit of the drafters' thinking.

In January 1995, eight months after the African National Congress government took office, South African prisons had an official capacity

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<sup>95</sup> Judicial Inspectorate of Prisons- Office of the Inspecting Judge Prisons & Prisoners- Annual Report 2004/2005

<sup>96</sup> Judicial Inspectorate of Prisons- Office of the Inspecting Judge Prisons & Prisoners- Annual Report 2004/2005

<sup>97</sup> Mandela N *Long Walk to Freedom* (London: Little Brown, 1994), at 201

of 96 361, with an actual prison population of 116 846. The prisons were, in other words, at 121% of capacity. Nearly ten years later, South Africa's prison population had grown by approximately 58%. Frantic prison construction had not come close to matching the swelling numbers of inmates and levels of overcrowding had increased by 64% (April 2004)<sup>98</sup>.

The daily average prisoner population is projected to increase to 188 100 prisoners in 2004/2005, 195 300 in 2005/2006 and 202 400 in 2006/2007<sup>99</sup>.

The increasing numbers of inmates reflects that the duration of sentences have increased, for instance sentences that would usually last up to third now lasts either a half or up to four-fifths and inmates that would normally serve 10-20 years of their sentences now serve anywhere from 25 years to life imprisonment<sup>100</sup>.

And the numbers continue to rise.

Somewhat shocking, is that a major reason for the dramatic overcrowding was that as many as 13 814 people were unable to afford bail of between R1 and R500. This is despite that in terms of s62(f) of the Criminal Procedure Act, when a judge awards bail it is because he has taken into consideration the security risk that the offender imposes on society, Judge Fagan, quite aptly put it that, "*It is only poverty that is keeping them in jail, at a cost to society of R110 per person per day*"<sup>101</sup>.

This translates into over R25 million per day spent for housing the approximately 186 000 prisoners<sup>102</sup>. Ironically, such expense to keep

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<sup>98</sup> Burger D (Ed) South African Government Information [South Africa Yearbook 2004/05](http://www.info.gov.za/aboutgovt/justice/corrections.htm) Government Communication and Information System (Last modified: 04 August 2005) available at <http://www.info.gov.za/aboutgovt/justice/corrections.htm> (accessed on 5 November 2005)

<sup>99</sup> Ibid

<sup>100</sup> "Ghastly Prison overcrowding presents huge problems" Without Prejudice May 2005 at 22-23

<sup>101</sup> Ibid.

<sup>102</sup> "Bleak future for jailed youngsters" Cape Times, 18 August 2005

all these offenders behind bars is failing to assist in curbing crime and rehabilitate the inmates.

### **6.1 Overcrowding and the Attention Gained Abroad**

Much research has been done overseas into areas such as the problems associated with prison overcrowding and Government officials in South Africa should take heed of some of their startling conclusions. In USA, for example, a focus group of some 20 seasoned prison officials came together to discuss ways to improve the functioning of the USA prison system. The focus group reported that when a prison reaches 80% of its design capacity, already the efficiency of the prison administration begins to suffer, particularly in the areas of the classification and movement of prisoners. The focus group identified that 'adjustments to or near abandonment of classification systems' as one of the most serious indices of overcrowding and which subsequently stunts the development of appropriate inmate rehabilitation programs.<sup>103</sup>

Despite large differences in wealth between South Africa and Germany, the German experience should also be closely scrutinised as our Constitution was significantly influenced by its German counterpart and many of the themes surrounding rights and human dignity that flow through the German text closely associate themselves with those in the South African text. In Germany, the belief is that the deterrence against crime is served best by the presence of an effective criminal legal system whereby retributive justice is fulfilled through high levels of conviction and sentencing. Once in prison, the primary focus is on the resocialisation of the offender rather than pure punishment.<sup>104</sup> As seen in the jurisprudence of the German Federal

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<sup>103</sup> Klofas *et al* 'The Meaning of Correctional Crowding' at 182 as cited in Johnny Steinberg 'Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa' Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005

<sup>104</sup> Steinberg J, *op cit* note 8

Constitutional Court one of the benefits of a system centralised around the idea of resocialisation is that it ties into the concept of the protection of one's human dignity – a core feature of the German Constitution. This was confirmed by German Federal Constitutional Court by connecting the resocialisation of a prisoner to the protection of prisoners' right to dignity. It has stated:

*Constitutionally, this claim [to resocialisation] corresponds to the self-image of a society that places human dignity at the centre of its value order... As the holder of human dignity and the rights which guarantee it, the criminal offender must have the chance, after serving his sentence, to integrate into society*<sup>105</sup>.

## **6.2 Overcrowding –square meters per inmate**

The situation with regards to overcrowding in South African jails is bleak. In his article on prison overcrowding in South Africa, "Treating Prisoners like Dogs is not going to Solve the Problem"<sup>106</sup>, Johnny Steinberg calculated that with the overcapacity by more than 74 000 inmates, each inmate is left with an average of only 2 m<sup>2</sup> of floor space. This, despite the prescribed figure of floor space for a inmate in a communal cell is 3.344 square meters accommodation which form part of the regulations written by the DCS and governed by the Correctional Services Act<sup>107</sup>.

A shift in attitude does seem to be on the horizon. As the problem of overcrowding worsens, the issues surrounding prison conditions is piercing the public consciousness, and where once there was ignorance or denial, a new shift in thought is taking place in all

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<sup>105</sup> Cited in Lazarus, *Contrasting Prisoners' Rights*, at 42, Steinberg J, op cit note 77

<sup>106</sup> Johnny Steinberg 'Treating Prisoners like dogs is not going to solve the problem' 21 February 2005, also found at [http://www.nicro.org.za/cspri/Articles/articles\\_detail.asp?art\\_ID=207](http://www.nicro.org.za/cspri/Articles/articles_detail.asp?art_ID=207) (accessed on 10 August 2005) Ibid Johnny Steinberg

<sup>107</sup> De Vos P, "Prisoners Rights litigation in South Africa Since 1994: A critical evaluation" University of the Western Cape. Civil Society Prison Reform Initiative ("CSPRI") Research Paper Series No. 3, November 2003, also available online at [www.nicro.co.za/cspri](http://www.nicro.co.za/cspri) (accessed on 2 June 2005)

sectors of society as to how to address these problems more seriously. Even the courts, traditionally fearful of tackling sensitive issues such as these have begun to sit up and take action. In the sentencing of former first lady Winnie Madikizela- Mandela, Judge Eberhard Bertelsmann graphically depicted the conditions facing inmates in South African jails. He notes that<sup>108</sup>:

*“Beds are placed bunk-style on top of one another, with only a few inches separating them. Prisoners are locked up for 23 hours per day, with sanitary facilities which are by definition overburdened and consequently in a regular state of disrepair. The same holds good for the warm water supply, electricity and other creature comforts.*

*It is no exaggeration to say that, if an SPCA were to cram as many animals into a cage as our correctional services are forced to cram prisoners into a single cell, the SPCA would be prosecuted for cruelty to animals. The crisis in our prisons has huge constitutional implications for the whole criminal justice system, and urgent steps need to be taken to address our entire sentencing and prison regimes<sup>109</sup>”.*

Such poignant words by Judge Bertelsmann should not be seen to be limited to the South African experience alone.

Many other countries face similar battles to find solutions to the problems of upholding inmates’ rights with only limited resources at their disposal. In *Kalashnikov v Russia*<sup>110</sup>, the applicant was confined to a cell with 11 to 14 occupants, each of whom had 0.9-1.9 square meters of floor space. The court went on to describe other

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<sup>108</sup> Steinberg J, op cit note 8

<sup>109</sup> Steinberg J, “Treating prisoners like dogs is not going to solve crime problem” 21 February 2005, also found at [http://www.nicri.org.za/cspri/Articles/articles\\_detail.asp?art\\_ID=207](http://www.nicri.org.za/cspri/Articles/articles_detail.asp?art_ID=207) (accessed on 10 August 2005)

<sup>110</sup> *Kalashnikov v Russia*, ECHR, 2002

conditions of detention, but stressed that the question of floor space alone “raises an issue under Article 3 of the European Convention on Human Rights, which prohibits degrading treatment.

Hence the reasoning behind such extensive and explicit legislation found both the South African Constitution and International bodies which are there to protect inmates from cruel, inhuman or degrading treatment.

Despite a lack of guidance in local case law there is, however, international precedent on accepted accommodation standards. The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Punishment<sup>111</sup> has established four square metres per inmate as a minimum in a communal cell and six square metres for single cells. In the USA, both the American Correctional Association and the American Public Health Association have set standards requiring a minimum of 60 square feet (18.18 square metres) for each inmate<sup>112</sup>. These standards have now found their way into USA federal regulations; with the Bureau of Prisons having used them to establish the rated capacity of its prisons<sup>113</sup>. Courts have also used these standards to establish judicially enforceable minima.

In the state of Florida, for instance, it is illegal for a prison to exceed its rated capacity<sup>114</sup>.

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<sup>111</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Punishment hereafter referred to as “CPT” Morgan R and Evans M. D *Protecting Prisoners, The Standards of the European Committee of the Prevention of Torture in Context* 1999 at 3

<sup>112</sup> Chung, "Prison Overcrowding", 2356 Steinberg J, op cit note 77

<sup>113</sup> Bureau of Prisons, Rated Capacities for Bureau Facilities, Program Statement 1060.11, 30 June 1997 -In the United States, rated capacity reflects the number of inmates that can be housed safely in a facility Steinberg J, op cit note 77.

<sup>114</sup> Bales W.D and Dees L.G, "Mandatory Minimum Sentencing in Florida: Past Trends and Future Implications", in *Crime and Delinquency* vol. 38 no. 3, 1992, 309 Steinberg J, op cit note 77.

A similar situation prevails in Norway and Holland. In these jurisdictions, the size of the prison population is directly determined by available space<sup>115</sup>.

It may be argued that the South African official capacity represents an ideal unachievable with existing resources and that a limited degree of overcrowding should not be intolerable. Even so, the reality is that the overcrowding problem in South African jails is far from “limited” with prison populations growing at an astronomical rate. Furthermore, simple economics dictates that for an economy facing a situation of scarce and finite resources, the allocation of those resources to one area of the economy will necessitate the removal of resources from another area of the economy<sup>116</sup>. In South Africa, where there are vast numbers of people living on or below the poverty line, providing extra accommodation or healthcare to one inmate will mean less money to be spent on providing accommodation or healthcare for a law abiding citizen. Essentially, this means that transport, finance and economy will have to do their utmost virtually in terms of an umbrella ‘Marshall plan’<sup>117</sup>.

The question then arises as to whether a situation whereby one group’s right to human dignity is impaired by another’s (as the allocation of scarce resources invariably falls into this category) is acceptable in our Constitutional democracy. Perhaps the Courts in this country have been apprehensive in making a definitive judgment on the rights of inmates today because given the financial realities the country faces, such a decision would mean placing the rights of suspected and convicted criminals ahead of those in our society as a

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<sup>115</sup> Christie N, *Crime Control as Industry* (2nd and enlarged edition, London & New York: Routledge, 1994) Steinberg J, op cit note 77

<sup>116</sup> Glanz, Lorraine *Managing Crime in the New South Africa* King, Roy D & Maguire Mike (eds) Prisons in Context :Human Sciences Research Council (HSRC): Pretoria 1993 at xiv

<sup>117</sup> Ibid



whole. Supporters of prisoners' rights argue that inmates do not require such extensive rights so as to render the penal system useless, but that as human beings, inmates have inherent rights as protected under our Constitution which the Government has an obligation to uphold. Prisoner's rights activists further suggest that the Act and its regulations have not yet been promulgated exactly because the Department knows that it is unable at present to meet all the requirements stipulated in the Act<sup>118</sup>. All these factors seem to suggest that from a purely legal perspective, prisoners' right litigation will often have a good chance of success in the South African Courts.

It also suggests that it may be possible, under the right conditions, to use the mere threat of litigation to force changes in the way the Department and its leadership in individual prisons operate. The argument from prisoners' rights activists would be similar to the debate surrounding socio-economic rights. Socio-economic rights, or positive rights which are to be found in our Constitution placing a positive obligation on the Government to provide certain rights, such as the right to housing<sup>119</sup>, adequate healthcare<sup>120</sup> and education<sup>121</sup> to the population. It was the belief of the Constitutional authors that where people were not given access to these basic positive rights it would render the fundamental negative rights on which the new democracy would be based - the right to freedom, equality and human dignity - useless, and would therefore render the whole Constitutional text as such.

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<sup>118</sup> De Vos P, "Prisoners Rights litigation in South Africa Since 1994: A critical evaluation" University of the Western Cape. Civil Society Prison Reform Initiative ("CSPRI") Research Paper Series No. 3, November 2003, also available online at [www.nicro.co.za/cspri](http://www.nicro.co.za/cspri) at 39 (accessed on 2 June 2005)

<sup>119</sup> Section 26 of the Constitution of South Africa

<sup>120</sup> Section 27 Ibid

<sup>121</sup> Section 29 Ibid

### 6.3 Overcrowding and HIV/AIDS

Despite the gross human rights deprivations due to the overcrowding, there is another disturbing social phenomenon that exists with the prison cells. As John Howard noted as far back as 1777, that the mixing of inmates' of all types in the same jail spreads diseases rapidly<sup>122</sup>.

Today prisons remain a melting pot of diseases, viruses and infections, which has become ever more serious with the HIV/ AIDS pandemic.

The HIV/AIDS pandemic is currently ravaging our country making it, along with poverty the country's most pressing problem. It is claiming millions of lives within South African communities and prisons are no exception. More disturbing, is the intention to spread HIV/AIDS, which was addressed by Dr. Anthony Minaar, from the institute of Human Rights and Criminal Justice Network, saying that-

*“Overcrowding is only one of the factors. There are extremely strong gang cultures and rape is used for control and power and for the punishment of non-members. Gangs catch up with so called enemies and one of the forms of punishment is a so-called “slow puncture”. This was the rape of an inmate by a fellow inmate who knew he was HIV-positive- thereby inflicting a death sentence”<sup>123</sup>.*

Bearing in mind that 4 out every 1000 South Africans are in prison and that “prisoners are primarily young, black men from impoverished

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<sup>122</sup> John Howard's influence on prison reform was unrivalled in both England and the United States, author of “State of Prisons” in 1777 helped influence the British Parliament to pass penal reform legislation, namely the Penitentiary Act of 1779, Encarta Encyclopaedia standard Edition 2004

<sup>123</sup> “HIV turns SA Jail into “death sentence” PE Technikon HIV/ AIDS information service taken from The Sunday Independent 18 January 2003  
<http://www.petech.ac.za/aids/2003HIV001%20Jail%20sentence> (accessed on 2 June 2005)

communities which are already hardest hit by HIV/ AIDS”<sup>124</sup>, the overcrowding of prisons only adds fuel to this perilous fire.

The numbers in South African Prisons indicate that there is a high concentration of persons living with HIV/AIDS, with an assumed prevalence rate of between ten and thirty percent of inmates infected with HIV/AIDS in South Africa’s prisons.

The following are official statistics pertaining to HIV/ AIDS in the world:

- In May 1996 in England and Wales prisons 8 inmates were identified to be HIV positive or suffer from AIDS<sup>125</sup>.
- In the USA States of America in 1995 2,3 percent of the entire population were infected with HIV or AIDS, a total of approximately 24 200 individuals. In the same year, more than 1000 inmates died of AIDS in prison. The overall rate of confirmed AIDS cases among the American inmate population in 1995 was more than six times the rate in the general U.S. population<sup>126</sup>.
- In South Africa, by 31 December 1999 there were 2 600 registered cases of HIV and 136 cases of AIDS. There were also 1 360 cases of tuberculosis. The response from the Department of Correctional Services (“DCS”) reported that there were about 3 427 cases within the reporting period which means that from 31 December 1999 to 31 March 2000, (3 months) there has been an increase of 691 cases in HIV/AIDS infections<sup>127</sup>. By

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<sup>124</sup> KC Goyer, research consultant for the institute for Security Studies. Ibid

<sup>125</sup> Morodi L, R “The Constitutional Rights of Prisoners within the South African Criminal Justice System” Department of Criminology, University of South Africa, available at [www.crisa.org.za/downloads/rights.pdf](http://www.crisa.org.za/downloads/rights.pdf) (accessed on 6 January 2005).

<sup>126</sup> Encarta Encyclopaedia standard Edition 2004

<sup>127</sup> Heywood M “The HIV/AIDS Problem in our Prisons” in Correctional Services: “A Collective Social Responsibility” Report of the Proceedings of the 1st National Symposium of Correctional Services, 2000 (2001) DCS, Pretoria, “Prisoners’ rights CHAPTER TEN PRISONERS’ RIGHTS” available at [Sahrc.org.za/chapter\\_10.PDF](http://Sahrc.org.za/chapter_10.PDF) (accessed on 5 November 2005).

2003, there were a reported 1562 cases of natural deaths in prison<sup>128</sup>.

These numbers are not unbelievable and support the version of events of inmates who are speaking out against the conditions in prison. In a recent newspaper<sup>129</sup>, a Western Cape inmate described in his affidavit how he was suffocated and raped. The chances of his contracting HIV/ AIDS are far from remote. In 2003 it was estimated that at least 43% of those leaving jail were carriers of AIDS<sup>130</sup>.

John Moorhouse, a Prison Care and Support Network<sup>131</sup> board member commented that, overcrowding meant gangsterism flourished as warders could not supervise jails properly<sup>132</sup>. He continued onto say that the government has been aware of the problems since at least 1999, and that, *"the only possible inference is that it is not willing or able to deal reasonably and accountably with the issues raised by the applicant"*<sup>133</sup>.

The main causes for transmission of HIV/ AIDS in prison is high behaviour before and after incarceration; sexual activity; gangsterism (tattooing with contaminated needles; and overcrowding<sup>134</sup>. Aside from

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<sup>128</sup> Reuters D "HIV Aids and Prisons" presentation by NICRO on HIV Aids in prison 2003, available at [www.nicro.org.za/cspri/Publications](http://www.nicro.org.za/cspri/Publications) (accessed on 6 January 2005).

<sup>129</sup> "Prison rape aired in court bid to end overcrowding" Cape Times 29 September 2005.

<sup>130</sup> Natural deaths in South African prisons have increased more than five-fold since 1995 and about 90 percent of prison deaths are believed to result from HIV/AIDS. In some prison hospitals in KwaZulu-Natal, 95 percent of the deaths are attributed to tuberculosis and/or HIV. "HIV turns SA Jail into "death sentence" PE Technikon HIV/ AIDS information service taken from The Sunday Independent 18 January 2003 <http://www.petech.ac.za/aids/2003HIV001%20Jail%20sentence> (accessed on 2 June 2005)

<sup>131</sup> Prison Care and Support Network hereafter referred to as "PCSN"

<sup>132</sup> Standing A, notes that *"the Professor of Criminology at the University of Cape Town, Wilfred Scharf, points out that gangs have only been able to survive due to corrupt links to the police; corruption is a major cause of gangsterism. Indeed, in an interview with two police gang experts they argued that without corruption gangs would have been removed years ago"*. The threat of gangs and anti-gangs policy. Policy discussion paper, *Occasional Paper 116*, August 2005 available at <http://www.iss.org.za/pubs/papers/116/Paper116.htm> (accessed on 6 January 2006)

<sup>133</sup> "Prison rape aired in court bid to end overcrowding" Cape Times 29 September 2005.

<sup>134</sup> Reuters D "HIV Aids and Prisons" presentation by NICRO on HIV Aids in prison, available at [www.nicro.org.za/cspri/Publications](http://www.nicro.org.za/cspri/Publications) (accessed on 6 January 2005).

alleviating the overcrowding within prisons, the DCS must begin to implement education programmes amongst the inmates. HIV/ AIDS awareness must be encouraged and contraception must be provided. For, until such time, the spread of HIV/AIDS via rape a very real possibility for both awaiting- trial inmates as well as those sentenced. The rise of a new death sentence, haunting inmates throughout their incarceration is surely an unwanted element in a system aiming to rehabilitate inmates.

Other strategies in order to address the problem of HIV/ AIDS include, discharge of terminally ill patients<sup>135</sup>; screening for early treatment<sup>136</sup>, HIV Testing upon request<sup>137</sup> and training of personnel and inmates.

#### **6.4 The Effect of Overcrowding on Inmates**

The law now gives back dignity to inmates who were subjected to treatment that was degrading and inhumane. It returns justice and hope to a place that was once notoriously barren of it. However, despite having come a long way, sitting in an overcrowded prison cell for 23 hours a day has a huge impact on the psyche of inmates. Without sufficient stimuli, boredom mixed with aggression and fear fuel the need in inmates to protect their limited territory. This led to the explicit need to ensure that the rights of inmates should be safeguarded at all times. It can be said that psychology now plays an integral part in the management of inmates as a result of their research into prison and interaction amongst inmates within. Their suggestions and empirical study has been highly conducive to the design of an atmosphere where rehabilitation of inmate can be made possible.

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<sup>135</sup> Correctional Services Act 111 of 1998 s79

<sup>136</sup> Stanfield v Minister of Correctional Services and Others 2004 (4) SA 43 (C).

<sup>137</sup> Deon Reuters "HIV Aids and Prisons" presentation by NICRO on HIV Aids in prison, available at [www.nicro.org.za/cspri/Publications](http://www.nicro.org.za/cspri/Publications) (accessed on 6 January 2005).

Speaking in December 2004 at the launch report by the British Parliamentary Joint Committee on Human Rights into Deaths in Custody, the Chairperson, Jean Cortson MP, noted:

*“Crime levels are falling but we are holding more people in custody than ever before. The misplaced over-reliance on the prison system for some of the most vulnerable people in the country is at the heart of the problem that we encountered... Extremely vulnerable people are entering custody with a history of mental illness, drug and alcohol problems and potential for taking their own lives. These people are being held within a structure glaringly ill suited to meet even their basic needs<sup>138</sup>”.*

All psychologists employed for any length of time in correctional institutions will inevitably be drawn into debate regarding two fundamental issues: the control or management of inmates and their long term adjustment or rehabilitation. Venables and Raine<sup>139</sup> draw attention to research that indicates that harsh and stressful conditions are associated with the development of low adrenalin levels. They suggest that coping with difficult inmates in a punishment based regime may be counter productive since prolonged exposure to such conditions may actually undermine the anxiety responses which normally keep aggressive impulses in check<sup>140</sup>. The results of the study are crucial in order to maintain the security of inmates within the cell. One such test specifically aimed at the blood testosterone levels indicated a strong link both to dominance and to violent behaviour. Their suggestions are vital when grouping inmates together in order to ensure a balance of power within the cell, especially with the problem of overcrowding.

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<sup>138</sup> Coyle A, “On being a prisoner in the United Kingdom in the 21<sup>st</sup> century. Does the Wilberforce judgment still apply? 22 March 2005

<sup>139</sup> P.H Venables and A. Raine “Applying Psychology to Imprisonment”

The prison environment is characterized by factors which can have adverse effects on individual inmates. In the prison setting crowded conditions are chronic, people prone to anti-social behaviour are gathered, there is an absence of personal control and idleness and boredom can be prevalent. In an article titled “Inside Out” Casper Greef records the images left in the mind of Mikhael Subotzky who first entered the Pollsmoor prison in Cape Town for purposes of a photography project. Michael Subotzky describes a sense of anarchy within the cell, 54 inmates (which is designed to hold 25 men) and their ‘*pitiful possessions*’. He recounts seeing some men lying on the floor, some on mattresses, some standing in groups or in isolation with many of them bare chested and some just staring into ‘*the recesses of their own heads*’<sup>141</sup>.

Research has indicated that overcrowding has three types of effects on the daily prison environment<sup>142</sup>. First there is less of everything to go around, so the same space and resources are made to stretch even further. The opportunities for inmates to participate in self-improvement and rehabilitative programs are therefore limited. The lack of work or work opportunities lead to inmate idleness, often reinforcing the maxim that idleness breeds discontent and disruptive behaviour<sup>143</sup>. In addition, lack of resources can apply to anything an inmate might need to use, such as washroom availability, library books, television lounge seating and recreational materials. The unavailability of resources can have twofold consequences. One is the frustration or unpleasantness of being limited or denied a resource, and the other is the fact that competition and conflict over limited resources often lead to aggression and violence<sup>144</sup>.

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<sup>140</sup> McGurk B. J, Thornton D. M and Williams M (eds) *Applying Psychology to Imprisonment. Theory and Practice*, 1987.

<sup>141</sup> “Inside out” *Sunday Times*, 17 April 2005

<sup>142</sup> John Howard, Society of Alberta “Prison Overcrowding” 1996

<sup>143</sup> Cox, Paulus, & McCain, 1984, at 1149 Ibid.

<sup>144</sup> Johnston, 1991 at 19 Ibid.

The second effect of overcrowding is on the individual inmate's behaviour. As previously stated, crowding creates stress and this, in conjunction with other factors in a prison setting, can heighten the adverse effects of overcrowding. Idleness, fear, the inability to maintain personal identity, or to turn off unwanted interaction and stimulation, such as noise, all add to the stress of crowding. The adjustment process for inmates to cope with excess stress varies; it could be withdrawal, aggression or depression. Whatever way an inmate chooses to deal with overcrowding stress, they generally tend to be methods, which do not enhance the health of the inmate<sup>145</sup>.

The third effect involves a combination of the correctional system's inability to meet the increased demand for more space and the resulting harm to individual inmates. In an attempt to cope with the limited space available and the resulting overcrowding, there has been a strong tendency to misclassify inmates. To a certain degree, overcrowding has resulted in inmates being classified on the basis of the space available rather than the security level and programs most suitable for the inmates<sup>146</sup>. The Chief Inspector of Prisons for England and Wales commented in her 2001-02 annual report saying that the safety depends on,

*'...dynamic, as well as physical, security: relationships between staff and prisoners that provide both understanding and intelligence. These are much less easy to make and sustain when there are more prisoners...Frustration at the amount of time spent in a cell, or location away from home, can easily boil over into disturbances, and it is scarcely surprising that these, too, have increased'.<sup>147</sup>*

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<sup>145</sup> Cox et al., 1984, at 1150

<sup>146</sup> Cox et al., 1984 at 1156 op cit note 136

<sup>147</sup> Annual Report of Her Majesty's Chief Inspector for Prisons in England and Wales, 2001-2002, Steinberg J, op cit note 8



A legitimate distribution of power and authority in prisons is difficult. It follows for Mathiesen a Professor at the University of Oslo at the Department of Criminology and Sociology of Law, argues that any positive reform is open to be seen by the prison institution as an opportunity for relegitimation. Consequently, Mathiesen argues the only reforms which should be pursued are those which are 'negating, exposing, and of the abolishing kind'.<sup>148</sup>

However, as that is not possible in the current environment it is viewed to be a goal that must be ultimately achieved. A start would be to understand the reasons behind the protection<sup>149</sup> of inmates (an issue which lies at the heart of the prisons problem). This would help in the implementation of appropriate regulations that would take that into account.

A White Paper on the Policy of the Department of Correctional Services in the New South Africa (1994) stated the government's belief that inmates have the potential to change their behaviour and to be reincorporated as law-abiding members of society. It was clearly perceived that the prison conditions existing in the country at that time did not provide an environment in which such a policy could be implemented.

The guarantee of the right to human dignity is not a proactive step of reformation, but it is more the foundation upon which any reformation must be built. Without such a guarantee, it is not possible to facilitate the reformation of a detainee. Another crucial value to creating a correctional facility free of human rights violations is that legislation acts as a standard which the can referred to when expressing concern about particular instances or types of treatment,

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<sup>148</sup> Van Zyl and Dunkel 'Imprisonment Today and Tomorrow, International Perspectives on Prisoners' Rights and Prison Conditions, Second Edition. 2001.

<sup>149</sup> On a more practical level, with regards to protection of the safety of prisoners, a new electronic tagging system has been introduced in Johannesburg, which entails that every prisoner is issued with a tracking device. If a prisoner is killed or assaulted the alarm will sound and also record who was within the 3 meter radius. Johannesburg Attorneys Association Annual Report and Newsletter October 2005

and one through which more specific recommendations and views can be interpreted.

## **7. South African Case Law**

Through case law inmate's rights have definitely evolved, and the days where it was acceptable to treat inmates as animals have been replaced by an awareness and respect for their rights and dignity as well as the rule of law. Interesting that this, despite what happened in reality was the stance since 1912. The Appellate Division confirmed as early as 1912 that the common-law position that all prisoners:

*“are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for the purposes of gaol discipline and administration.”<sup>150</sup>*

While the law as enforced by the South African courts now recognises the basic rights of inmates this was not reflected in the way the Department of Correctional Services dealt with inmates from day to day. However, this discrepancy between legal position of inmates on the one hand, and the factual reality in which inmates actually find themselves on the other, persisted and to some extent became even more pronounced after the advent of a the Constitution brought to power many of the leaders who had experienced prison at first hand.

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<sup>150</sup> Whittaker v Roos & Batemen; Morant v Roos & Batemen 1912 AD 92 123

In 1993, in a remarkable turnaround in South Africa, the full bench of the Court of Appeals in the case of *Minister of Justice v Hoffmeyer*<sup>151</sup>, accepted the general principle laid down in *Raymond v Honey*<sup>152</sup>, namely that an inmate retains all his personal rights except those abridged by law, and that the extent and content of such rights should be determined by reference not only to the legislation, but also to the common-law rights of inmates. It also ruled that inmates could not be limited to a few basic rights with everything else being regarded as a privilege to be granted or withdrawn by prison officials at their own discretion.

A second revolutionary aspect, as discussed in the case was that human needs cannot be defined in abstract, but only take shape and acquire meaning in particular contexts. For inmates, of course, the relevant context is the fact of their confinement. Access to amenities which, outside of prison, may constitute a mere diversion or a comfort, could, in the confined and relatively deprived conditions of prison life, constitute a fundamental need, and thus, in law, find expression as an individual right. This principle is most clearly stated in *Hoffmeyer's case* by Hoexter J.A:

*“...the line of demarcation between (‘comforts’ on the one hand, and ‘necessities’ on the other hand) is so blurred and so acutely dependant on the particular circumstances of the case as to be of little value. An ordinary amenity of life, the enjoyment of which may in one situation afford no more than a comfort or a diversion, may in a different situation represent the direst necessity. Indeed, in the latter case, to put the matter starkly, enjoyment of the amenity may be a life line making the difference between*

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<sup>151</sup> *Minister of Justice v Hoffmeyer* 1993 (3) SA 131 (A)

<sup>152</sup> *Raymond v Raymond v Honey* (1982) 1 All ER 716, House of Lords which raised the on the rights held by inmates. Lord Wilberforce, stated that, “*Under English law a convicted prisoner retains all his civil rights which are not taken away expressly or by necessary implication*”

*physical fitness and debility; and likewise the difference between mental stability and derangement*<sup>153</sup>.

Following from that, inmates have also been able to argue that, where they have been granted privileges, the means for enjoying them must also be provided. The Witwatersrand Local Division has ruled that a decision at Johannesburg Prison to remove access to electrical sockets, and thus to television, radio and music, violated the applicants' constitutional rights<sup>154</sup>. Schwartzman J. has used this common law *residuum* principle to interpret inmates' constitutional rights to conditions of detention consistent with human dignity and the right not to be subjected to cruel and degrading punishment, the judge argued that for the applicants:

*... the prospect of being able to enjoy privileges recognised by the Department of Correctional Services for which access to electricity is an indispensable requirement cannot be characterised as "no more than a comfort or diversion" and "could be an amenity of life that makes the difference between mental stability and derangement." It could also materially affect their prospects of rehabilitation, one of the recognised objectives of imprisonment. To deprive them entirely and in perpetuity of this prospect could also result in their being "treated and punished in a cruel and degrading manner" (section 12(1)(c) of the Constitution) or their being detained in conditions that are inconsistent with human dignity (section 35(2) of the Constitution)*<sup>155</sup>.

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<sup>153</sup> Minister of Justice v Hoffmeyer 1993 (3) SA 131 (A) at 141-142

<sup>154</sup> Strydom v Minister of Correctional Services and others, WLD 1999(3) BCLR 342 (W).

<sup>155</sup> Ibid

Thus, the state has been held to an undertaking to provide long-term inmates access to electricity where according to the terms of the privilege system they were entitled to.

Other cases involved disputes with the department about medical releases for terminally ill inmates. Most applications followed on from the successful court challenge in the 2003 Cape High Court Case of gang boss Colin Stanfield, whose release was ultimately granted by the court<sup>156</sup>. In this case the applicant applied to be placed on parole in terms of s69 of the Correctional Service Act 8 of 1959 on the basis that he had contracted lung cancer and his life expectancy had been severely shortened. His application was refused and the matter went on review. The applicant argued, inter alia, that s69 should have been interpreted so as to promote, the spirit, purport and the object of the Bill of Rights as required by s39 of the Constitution and that in terms of the s10 right to dignity the applicant was entitled to die in a dignified and human way. In the judgement, mention was made of the rarity of successful applications for release on medical grounds, foreshadowing the prospect of considerable judicial sympathy for well-founded future requests for this form of release. In granting the application Judge Van Zyl stated that:

*“the facts set forth in the most recent annual report of the Judicial Inspectorate of Prisons indicate a shocking state of affairs. Despite the huge increase in the prevalence of HIV/ AIDS and other terminal diseases in our prisons, only the tiniest percentage of prisoners suffering from such diseases were released on medical grounds during 2002. I associate myself fully with the call by Inspecting Judge JJ Fagan that the release of terminally ill prisoners should receive more attention, if not priority attention, than is the case at the present time. The alternative is grotesque: untold numbers of prisoners dying in prisons in the most*

*inhuman and undignified way. Even the worst of the convicted criminals should be entitled to a human and dignified death”.<sup>157</sup>*

A more unconventional claim was launched in the courts and reached the press in October 2004 concerning an application for damages (R20 million) arising from the exposure of an awaiting-trial inmate to smoking<sup>158</sup>. The Minister of Correctional Services is alleged to have failed to ensure that prisons complied with the Tobacco Products Control Amendment Act 12 of 1999, and to have failed to protect the plaintiff from potential risk of harm occasioned by exposure to tobacco smoke.

On 15 November 2004 another claim for personal damages was lodged due to adverse conditions facing awaiting-trial inmates held in detention. The businessman concerned was found not guilty of the alleged offence after being incarcerated for three months. He brought a claim against the Minister of Safety and Security more specifically relating to his complaints regarding his acquisition of sires from lice-infected blankets, being forced to witness how cell-mates were sodomised and assaulted with sharpened spoons, and he himself being forced to become a dagga courier, the case is still pending<sup>159</sup>.

Interestingly, it appears from the press report that his claim was brought against the Minister of Safety and Security on the basis of malicious prosecution, which had given rise to the arrest and subsequent period of detention in prison<sup>160</sup>.

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<sup>156</sup> Stanfield v Minister of Correctional Services (2003) 4 All SA 282 (C)

<sup>157</sup> Ibid at 128

<sup>158</sup> Nielson J S, “There’s no smoke without ire in jail”

[www.thestar.co.za/generalprint\\_article.php?fArticle=2273](http://www.thestar.co.za/generalprint_article.php?fArticle=2273) (accessed 16 November 2004) also at “Human Rights, prisoners and the courts: you vadis?” Advocate April 2005 at 36-38

<sup>159</sup> One study showed that there is a 95% chance of being sodomised in prison. “Bleak future for jailed youngsters” Cape Times 18 August 2005

<sup>160</sup> “Ex-inmate sues for lousy cell” [www.news24.com/News24/South\\_Africa/news/..2-7-1142\\_1341606,00htm](http://www.news24.com/News24/South_Africa/news/..2-7-1142_1341606,00htm) (accessed on 16 November 2004) as cited in Julia Sloth Nielsen “Human Rights, prisoners and the courts: you vadis?” Advocate April 2005 at 36-38

Finally, going to the very root of the status of an inmate in South Africa is the recent challenge to the introduction of the bright orange uniforms used as standard issue to sentenced inmates in this decade. They comprise of garishly coloured overalls stamped more than a hundred times with “prisoner” and it was argued that it constituted as an infringement of the right to dignity of incarcerated persons. The allegation is that this form of labelling is inconsistent with the constitutional injunction that inmates be kept in conditions that are consistent with human dignity, that it is stigmatising and derogatory<sup>161</sup>. It is not unusual to see inmates wearing their uniforms inside-out in order to hide the word “prisoner” printed all over their uniform<sup>162</sup>.

Although the Constitutional Court has not directly pronounced on the conditions under which inmates are kept in South Africa, its decisions make it clear that it will be quite sympathetic to Constitutional claims based on section 35 of the Constitution mainly because the non-compliance with these provisions will have a serious effect on the human dignity of inmates.

## **7.1 South African Litigation Tactics**

Much can be learnt from the method and strategy employed by the TAC, in its fight to force the Government to fulfill its Constitutional obligations. This is because the TAC has used public interest litigation as a part of a more comprehensive strategy to win rights for its

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<sup>161</sup> Nielson J. S, Convicts go to court over “degrading orange uniforms” [www.sundaytimes.co.za](http://www.sundaytimes.co.za) (accessed on 15 December 2004) also at “Human Rights, prisoners and the courts: you vadis?” Advocate April 2005 at 36-38 also found at [www.cspri.co.za](http://www.cspri.co.za)

<sup>162</sup> Nielsen J. S “Human Rights, prisoners and the courts: you vadis?” Advocate April 2005 at 36-38

constituents. Jonathon Berger explains that the TAC's approach to the use of the law is multifaceted<sup>163</sup>:

*'While TAC aims to secure a legal victory whenever litigation is undertaken, the organization is also highly aware of the role of the litigation process beyond the orders made in court judgments. In addition, by framing political and moral demands in the language of legal rights and Constitutional obligations, TAC seeks to use the law without necessarily having to litigate. Recognizing that the "formal consent of a bill of rights is often less useful than the fact that it brings under scrutiny the justification of laws and decisions'.*

In essence, it proposes placing on the agendas of judges and in the courts of public opinion by making the cases about real people. It follows prison litigation would overwhelm courts thereby putting legislation into its proper context and involving the public in order to raise awareness and sympathy. Constitutional validity of sentences that in the past appeared straightforward will be questioned and the repercussions of which will be forced to be considered. For instances where the bail applicants arguing that a failure to grant them bail would result in their detention under conditions that violate their rights under section 35(2) of the Constitution or an inmate might also argue that his sentence is illegal inasmuch as the prison administration is, due to overcrowding, unable to execute a sentence plan required of it by the Correctional Services Act, may prove to be successful strategies.

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<sup>163</sup> Berger J "Litigation strategies to gain access to treatment for HIV/ AIDS: The case of South Africa's Treatment Action Campaign" vol 20 no 3 (2002) Wisconsin International Law Journal 595 at 597 as cited in Prof. Pierre de Vos "Prisoners Rights litigation in South Africa Since 1994: A critical evaluation" University of the Western Cape. Civil Society Prison Reform Initiative ("CSPRI") Research Paper Series No. 3, November 2003, also available online at [www.nicro.co.za/cspri](http://www.nicro.co.za/cspri) (accessed on 2 June 2005)



The advantage of these types of tactics is that they would draw the courts into considering the broadest possible range of ills associated with overcrowding in the course of developing law on accommodation.

Some, such as Prof. Pierre de Vos in his paper<sup>164</sup> have argued that proceeding on this case-by-case basis might not be the most efficacious route to take. Van Zyl Smit agrees noting that, '*Evaluation of the constitutionality of detention on this basis in individual cases is not impossible but it would be time-consuming and messy*'.<sup>165</sup>

However, should this be the only route available in order to ensure that inmates' rights are preserved, then it is owed to them to be pursued.

In the subsequent cases before the courts of *Government of South Africa v Grootboom*<sup>166</sup> and *Minister of Health v TAC*<sup>167</sup> a discussion took place as to the responsibilities of government to provide for the various positive rights. Such debate took place remembering the language in the document to the provision of these positive rights being done 'within its available resources.'<sup>168</sup>

It is submitted here that should the Constitutional Court have before it a case in the future, say for example on the right of inmate to adequate floor space, the Court must be brave enough to move beyond the decisions of *Grootboom* and the Treatment Action Campaign<sup>169</sup> cases and adopt the international standard of the provision of positive rights as stated General Comment No. 4 (1991) of the UN Committee

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<sup>164</sup> De Vos P, "Prisoners Rights litigation in South Africa Since 1994: A critical evaluation" University of the Western Cape. Civil Society Prison Reform Initiative ("CSPRI") Research Paper Series No. 3, November 2003, also available online at [www.nicro.co.za/cspri](http://www.nicro.co.za/cspri) at 39 (accessed on 2 June 2005)

<sup>165</sup> "Capacity is calculated on the basis of 3.344 square meters per prisoner in a communal cell and 5 square meters in a single cell. A direct communication from the Department of Correctional services with Van Zyl Smit (10 September 2002) states that these standards are set by the Department of National Health". Van Zyl Smit, "Swimming Against the Tide", at 251

<sup>166</sup> *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 CC

<sup>167</sup> *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 CC

<sup>168</sup> Sections 25(2) and 26(2) of the Constitution of South Africa

<sup>169</sup> Treatment Action Campaign hereafter referred to as the "TAC"

on Economic, Social and Cultural Rights. It provides a guideline whereby there is a 'progressive realisation' of the provision of positive rights within the limits of available state resources. The guideline also calls for the provision of 'minimum core standards' which is the bare minimum the Government must provide so as not to violate basic human rights as determined by the international community. Although shying away from determining minimum core standards in the *TAC* case, it is recommended here that the Constitutional Court take reasonable steps to ascertain basic levels with regards to floor space, nutrition and healthcare etc and make a definitive ruling to place pressure on the Government to act on these obligations. By taking into consideration the limited resources of the Government as well as working for the progressive realisation of more substantial rights for inmates, it is argued that inmates would be accommodated in an environment which upholds the governments obligations under Section 7(2) of the Constitution to protect, respect, promote and fulfil the obligations listed in the Bill of Rights whilst at the same time not allowing for the impairment of the human dignity of the ordinary citizens in our society.

However, as noted above, South Africa is not alone with this problem, and in the best of all possible worlds, the courts would establish and give effect to a global principle: a constitutional principle that the size of the national prison population should be determined by the space available. The above cases appear to indicate that, despite the lack of popularity for inmates, the courts will vigilantly safeguard inmate's rights against unjustifiable intrusions into constitutionally guaranteed rights and perhaps follow jurisprudence laid down internationally when asked to adjudicate of floor space within prisons in South Africa.

## **8. Ability of the Correctional Services to deal with Court Challenges**

Assuming that the courts apply the regulations of the DCS therefore binding them to uphold a prescribed floor space per inmate, the question is raised; do the authorities have to ability to abide by it?

It would seem that in order to do so, more prisons would need to be built, something which has been planned by the Correctional Services, four new prisons being built and in Kimberly; Klerksdorp; Leeukop and Nigel. They are expected to be completed by March 2007 at a cost of R360m each<sup>170</sup>.

To deal with the current crisis of overcrowding the choices currently at hand are to either wait until the new prisons are ready, to encourage judges to be more creative and practical in their sentencing and/ or to put pressure on parliament to revise the minimum mandatory sentencing rules, as introduced in 1997.

The Eastern Cape Division was recently confronted with a series of cases in which juveniles were sentenced to terms of incarceration in a reform school. The state could not implement the sentences because there are no reform schools in the Eastern Cape. The inmates were incarcerated for "inordinately long periods" in prisons or police cells awaiting the carrying out of their sentences<sup>171</sup>. Plasket J. found that a number of constitutional rights had been violated. Most involved the rights of the child under section 28 of the Constitution. He also found that the right not to be deprived of freedom arbitrarily, the right to dignity, and the right to a fair trial had been violated<sup>172</sup>.

The remedy the court formulated is worth noting. Plasket J. found that *"the 'usual' remedies, such as the declarator, the prohibitory*

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<sup>170</sup> Judicial Inspectorate of Prisons- Office of the Inspecting Judge Prisons & Prisoners- Annual Report 2004/2005

<sup>171</sup> S v Zuba and 23 similar cases, CA40 (2003), at para 1

<sup>172</sup> At para 21, Ibid

*interdict, the mandamus and awards of damages may not be capable of remedying ... systematic failures or the inadequate compliance with constitutional obligations, particularly if one is dealing with the protection, promotion or fulfilment of rights of a programmatic nature.*"<sup>173</sup> Instead, he formulated a "*structural interdict, a remedy that orders an organ of state to perform its constitutional obligations and report to the court on its progress in doing so from time to time*"<sup>174</sup>. In this regard Plasket J. ordered, among other things, that the provincial Education Department report on its short, medium and long term plans for the incarceration of juvenile inmates, and that a task team working on the establishment of a reform school in the province be identified and submit regular reports to the Judge President and/or the inspecting judge of prisons, until the reform school is established<sup>175</sup>.

The last of the violations listed by Plasket J. namely the right to a fair trial. The learned Judge argued that "*the right to a fair trial must include the right not to be subjected to a sentence substantially more severe than the one imposed by the court*"<sup>176</sup>. He cited Du Plessis J., who, in *S v Mahlangu* found<sup>177</sup>:

*"If a competent sentence can for practical reasons not be carried into effect, and the accused is prejudiced thereby, the proceedings cannot be said to have been in accordance with justice: the test is not only whether the proceedings were technically sound, but also whether their practical effect is just*"<sup>178</sup>.

Parallels to a potential jurisprudence on accommodation for adult inmates may be drawn. First, it would draw the courts into

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<sup>173</sup> *S v Zuba* and 23 similar cases CA 40 (2003) at para 37, Ibid

<sup>174</sup> At para 38, Ibid

<sup>175</sup> At para 38, Ibid

<sup>176</sup> Van Zyl Smit, "Swimming Against the Tide", at 233–234.

<sup>177</sup> *S v Mahlangu* 2000 (2) SACR 210 (T).

establishing law on accommodation standards. Secondly it would work towards establishing a very important principle in South African case law, that a sentence violates the right to a fair trial insofar as the state cannot implement it. Should this be case, it would therefore not be in accordance with constitutional and would inevitably force courts to address the systemic problem that sentencing regimes should be guided, in part, by the availability of prison space.

## **9. Recommendations**

In the Department of Correctional Services there have been subtle shifts in official policies. Some of these are designed to impact on prison conditions, including overcrowding. Controversial Commissioner Sithole and Minister Mzimela have been replaced by a new minister and by the series of commissioners.

The new commissioners have replaced the stance taken by Commissioner Sithole who was quoted saying that *‘They are animals. They must never see sunlight again’*,<sup>179</sup> at a press conference in March 1997 further stating that hardened criminals could be incarcerated deep underground in disused mineshafts.

The Judicial Inspectorate of Prisons, has become an important voice on prison conditions in general and on overcrowding specifically. Further investigations regarding the allegations of corruption, crime, mismanagement, violence and intimidation in DCS were investigated by the Jali Commission of Inquiry into Corruption in the Department of Correctional Services<sup>180</sup>.

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<sup>178</sup> S v Zuba and 23 similar cases CA 40 (2003) at para 30

<sup>179</sup> “Mineshafts mooted as super-prisons”, Mercury, 5 March 1997 as cited in Van Zyl Smit “Swimming against the Tide” at 232

<sup>180</sup> Sekhonyane M, “Showing its Teeth” The Jali Commission on prison corruption, Institute for Security Studies *Published in SA Crime Quarterly No 2, November 2002* available at

The Jali Commission revealed gross abuses in prisons as well as inside the DCS itself is beginning to set, one of the most notorious reports was the Grootvlei video<sup>181</sup>.

What is most likely to reduce the overcrowding, however, is more remissions of sentences, promoting alternatives to imprisonment like diversion and suspended sentences, greater use of parole and correctional supervision, replacing minimum sentence legislation with sentencing guidelines, assigning judges a fixed number of prison spaces so that they might rearrange their sentencing priorities and incarcerate only the most serious offenders and crime prevention initiatives such as social upliftment, education, housing, sport and job creation.

## 9.1 Release Policies/ Parole

### 9.1.1 Sentenced Prisoners

But by the late 1990s, two traditional mechanisms that were used in the past to manage prison volumes became increasingly unavailable, namely presidential amnesties (the unconditional release of sentenced prisoners)<sup>182</sup> and flexible parole policies. Even prior to 1990, there had been objections by the judiciary that these release policies were undermining the integrity of sentences passed. These proved to exact a political price too hefty to pay<sup>183</sup>. The government had also used

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<http://www.iss.co.za/Pubs/CrimeQ/No.2/6Sekonyane.html> (accessed on 5 November 2006)- The Jali commission of inquiry was appointed on 8 August 2001 and headed by Judge Thabani Jali.

<sup>181</sup> Grootvlei prison in the Free State shot into the spotlight after four inmates sneaked a video camera into prison to capture corruption. The video, aired by the SABC's Special Assignment programme, showed shocking scenes of warders drinking with prisoners, juveniles being sold for sex to older prisoners, warders smuggling a gun, drugs and alcohol into prison, and food being sold to warders from the prison kitchen. Ibid

<sup>182</sup> Judicial Inspectorate of Prisons- Office of the Inspecting Judge Prisons & Prisoners- Annual Report 2004/2005

<sup>183</sup> During December 1990 and July 1991, three successive amnesties were collectively responsible for the early release of no fewer than 64 883 sentenced prisoners, Van Zyl Smit, "Swimming Against the Tide" at 235

mass releases as part of negotiations in order to release political prisoners.

Before the changes, the flexible parole release system consisted of the often unrestricted release of inmates sentenced to very short terms and for almost all other sentences standard remission of one third of the sentence, coupled with discretionary conditional release on parole that could bring the date of actual release forward even further. This was widely used during the apartheid era and was scrapped in 1993, to be replaced by a confusing "credits" system, which could be awarded for good behavior<sup>184</sup>.

The Correctional Services Act<sup>185</sup> provided that a prisoner could be placed on parole after serving half of his sentence, less credits earned.

The post 1993 system has, in turn, recently been replaced by a new set of provisions passed into law in 1997, but into effect only in 2004 which render the release system even more rigid. The release provisions can be found in Section 50- 82 of the Act<sup>186</sup>.

Under the new provisions, prisoners serving life cannot be considered for release until they have served 25 years of their sentence. Prisoners sentenced under the mandatory sentencing provisions of 1997 can only be considered for release after they have served four-fifths of their sentence or 25 years, whichever is the shorter<sup>187</sup>.

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<sup>184</sup> Van Zyl Smit, "Swimming Against the Tide" at 235

<sup>185</sup> Correctional Services Amendment Act 68 of 1993 which replaced chapter VI, the chapter that deals with release of the Correctional Services Act 8 of 1959

<sup>186</sup> S50- 82 came into operation on 1 October 2004. They dealt with Community Corrections (ss 50-72), Release from Prison, Placement under Correctional Supervision, Day Parole and Parole. (ss73- 82).

<sup>187</sup> Section 136 of the Correctional Services Act 111 of 1998 provides that the release of prisoners already serving sentences shall not be affected by the Act and would be dealt with in terms of the Correctional Services Act 8 of 1959: the former policy and guidelines applied (ie half minus credits down to one third). Prisoners already serving life sentences are to be considered for parole after 20 years.

The general rule was that prisoners could be released on parole after serving one third of their sentences<sup>188</sup> and that that would be dealt with by the Commissioner of Correctional Services on recommendation of a parole board. Prisoners release on parole would mean that they are conditionally released and the conditions can take many forms- the form of house detention to occasional reporting. This method has also been used in the past. It has the advantage that the offender remains under supervision and returns to prison should he not adhere to the conditions laid down.

Prisoners serving life sentences could be considered for parole after serving ten years<sup>189</sup>. A parole board would report to the National Advisory Council who would make a recommendation to the Minister whether to place the prisoner on parole<sup>190</sup>.

The second mechanism used to keep prison numbers at a manageable level was amnesty. It usually entailed bringing forward release dates of a class of sentenced prisoners or of all sentenced prisoners. Typically, releases were linked to major events, such as the election of a new state president<sup>191</sup>.

In 1971 an amnesty was granted to those sentenced to 6 months as first time offenders and those sentenced to 3 months prison time falling into the category of recidivists. In 1981 amnesty was granted to those who had completed a quarter remission out of a sentence of 3 years. Further, on 2 June 2005, the current Correctional Services Minister, Ngconde Balfour announced that a maximum of six months special remission would be granted to all prisoners, with an extra 14 months for those jailed for less serious crimes. This was a welcomed

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<sup>188</sup> D van Zyl Smit SA Prison Law and Practice (1992) at 362 as cited in JJ Fagan, Inspecting Judge of Prisons "Our Bursting Prisons" Advocate April 2005 at 33-35

<sup>189</sup> D van Zyl Smit SA Prison Law and Practice (1992) at 362 as cited in JJ Fagan, Inspecting Judge of Prisons "Our Bursting Prisons" Advocate April 2005 at 33-35

<sup>190</sup> Correctional Services Act 8 of 1959 s 65 (5)

<sup>191</sup> In July 1998 on President Mandela's 80<sup>th</sup> birthday when about 120 000 prisoners were released.



step, but the concern remains as to whether this will be enough to alleviate the overcrowding problem<sup>192</sup>.

### 9.1.2 Awaiting- trial Prisoners

With regards to awaiting- trial prisoners, the Inspecting Judge in 2001 used an extraordinary power granted by s66 of the Correctional Services Act (8 of 1959) to the minister and the president release 8 451 unsentenced prisoners who had been granted bail of less than R1 000, but had been unable to post it. Also, invoking on s62 (f) of the Criminal Procedure Act No. 51 of 1997, which allows for a sentencing officer to release an accused on bail with the provision that the accused is supervised by a probation officer or a correctional official (via the community correction offices). The argument which was accepted was the court in principle did not consider them to be a threat to their communities should be they be released<sup>193</sup>.

Two other measures to limit the increase of the prison population amongst the awaiting- trial prisoners' include plea bargaining and an added provision to the Criminal Procedure Act which entitles the head of the prison to apply to the court for bail conditions to be reconsidered. With regards to the former and according to s63 A of the Criminal Procedure Act, No. 51 of 1977 the following requirements must be satisfied:

- The prison conditions may result in imminent danger to the inmate, or humiliating punishment<sup>194</sup>.
- The accused is charged with an offence in which a police official may grant bail;

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<sup>192</sup> "Mixed reaction over decision to reduce prison sentences" Cape Times 2 June 2005. The South African Prison Organisation for Human Rights (SAPOHR) said it welcomed the step, but was worried it would not help in reduce overcrowding.

<sup>193</sup> Van Zyl Smit "Swimming against the Tide" at 232

<sup>194</sup> Van Zyl Smit "Swimming against the Tide" at 232

- The accused was granted bail by the court but could not afford the bail amount.

In so far as plea bargaining is concerned, it is noted that the constitutional imperatives cannot be met especially under the current pressures experienced by the criminal justice system.

In the executive summary of the Law Commissioners Report (May 2001) reporting on the advantages of introducing plea and sentence agreements into South African law, it considered the following:

*‘a system which formalizes plea agreements and which the outcome of the case more predictable will make it easier for practitioners to permit their clients who are guilty to plead guilty. Protection of victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea bargaining may limit such exposure. The practice of plea negotiation in South Africa could therefore make an important contribution to the acceleration of the process’.*<sup>195</sup>

Despite its good intentions on a theoretical level, the practical realities of the provisions found in s105 A<sup>196</sup>, are very strict and render it difficult to carry out. It may even be argued that the prerequisites are so onerous, on both the accused and the prosecutor that it defeats the point of plea and sentences altogether<sup>197</sup>. A major advantage to plea bargaining is the potential to reduce the pressure on courts’ rolls. However, the procedures are very demanding; for instance, the accused must have legal representation. The result of this, especially in light of the Legal Aid Board’s policy of not assisting accused persons charged with minor offences such as common assault and shoplifting, is that indigent accused may only

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<sup>195</sup> “Plea Bargaining- constitutional imperative or rich man’s cop out?” Without Prejudice April 2005 at 22-23

<sup>196</sup> Criminal Procedure Act (51 of 1997) s105 A

<sup>197</sup> “Why Plea Bargaining may not produce the desired results” Without Prejudice May 2005 at 22-23

enter a plea and sentence agreements in respect of more serious crimes<sup>198</sup>. This is ironic, as the courts rolls are mostly clogged up with minor offences that are more suited for this plea bargaining mechanism and sentence agreements.

Another hurdle is that according to s105 (1)(a) of the Criminal Procedure Act, only prosecutors authorized by the National Director of Public Prosecutors are allowed to enter plea bargains and sentence agreements. The practical effect of that is, is that it will depend on which branch the accused is charged in, and whether there is an authorized prosecutor there or not. The alternative is to approach another branch where there is an authorized prosecutor and/ or control prosecutor. In order improve on this situation, the National Director has given directors, deputy directors, many chief prosecutors and some senior prosecutors this authorization.

Once all the negotiation requirements have been met, the court is still involved. Should the court reject the plea bargaining, after the accused has already pleaded guilty, the result would be utterly demoralizing. These conditions are necessary in order to ensure that all the checks and balances are in place and that it maintains a desired level of constitutional standard of justice, for example, the competence of the prosecutors is called into question. The problem is that it is unlikely to have a significant effect on the number of prisoners' awaiting- trial<sup>199</sup>.

## 9.2 Alternatives to Prisons

During the early 1990's the National Institute for Crime Prevention and the Reintegration of Offenders ("NICRO")<sup>200</sup> established a number

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<sup>198</sup> Ibid.

<sup>199</sup> Van Zyl Smit "Swimming against the Tide" at 232

<sup>200</sup> National Institute for Crime Prevention and the Reintegration of Offenders hereafter referred to as "NICRO"

of diversion programs in the Western Cape and KwaZulu-Natal. The new Child Justice Bill<sup>201</sup> includes diversion as a central feature of the new structure that will govern criminal proceedings against children, and provides for prison only as a last resort<sup>202</sup>. Diversion has been defined by a standard youth justice textbook as *'strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted'*<sup>203</sup>

The Child Justice Bill broadens this definition and makes provision for it to be allowed at any stage of the criminal justice process, with or without conditions, by provisionally withdrawing a case against the accused. This ensures that lengthy and costly criminal proceedings are avoided.

The first two programs were Youth Empowerment Scheme<sup>204</sup> and Pre-Trial Community Service<sup>205</sup>. Soon the need for a wider variety of programs was identified and these were subsequently developed, namely Family Group Conferences<sup>206</sup>, Victim Offender Mediation<sup>207</sup> and The Journey.

The YES program is described by NICRO as "a life skills programme" that usually runs for six to eight sessions, one afternoon per week at a local NICRO office or Department of Welfare office<sup>208</sup>. It utilizes group counselling and support sessions for between 15-20 young people. At the first and last session it is obligatory for parents or guardians to attend. However where there are no parents or legal guardians a

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<sup>201</sup> Child Justice Bill Section 75 Bill; published in Government Gazette No 23728 of 8 August 2002

<sup>202</sup> Approximately 1500 people were diverted each month on average by the lower courts in 2004/05 in comparison to 1250 in 2002/04. "Solutions and Recommendations to Prison Overcrowding" Portfolio Committee on Correctional Services 2004 available at [www.nicro.org.za/cspri/Publications](http://www.nicro.org.za/cspri/Publications) (accessed on 6 January 2005).

<sup>203</sup> Munice J, Youth and Crime: A critical Introduction, London, Sage, 1999 at 305

<sup>204</sup> Youth Empowerment Scheme hereafter referred to as "YES"

<sup>205</sup> Pre-Trial Community Service hereafter referred to as "PTSC"

<sup>206</sup> Family Group Conferences hereafter referred to as "FGC"

<sup>207</sup> Victim Offender Mediation hereafter referred to as "VOM"

relative or significant adult in that person's life is encouraged to participate.

The group discusses a variety of different issues focussing mainly on conflict resolution, crime and the law, parent-child relationships, responsible decision-making and assists the participants to take stock of their lives, enlighten them and steer them away from making the wrong choices. This program can be used as a pre-trial diversion or as part of a postponed or deferred sentence. In some provinces parents participate in a separate parenting skills training programme. Participants of YES are mainly referred by prosecutors (76%) followed by magistrates (15.5%) and less so by other sources including family members (1.6%), SAPS (1%) and schools (0.7%). About 0.1% of participants are '*self referred*'.<sup>209</sup>

PTSC is co-ordinated with the prosecutor and serves as a further investigation of the offender as to his/her suitability for the Diversion Program. The type of therapy offered via this means is that of community service. The technicalities and logistics of the community service to be carried out are determined at this stage.

Community service is allocated in terms of hours, which are calculated by the NICRO social worker in consultation with the public prosecutor. NICRO also monitors the performance of the offender and reports to the public prosecutor. On average the offender has to perform between 20 and 60 hours of community service.

FGC are more suited to young offenders who show a pattern of problematic behaviour. Its method is similar to the methods of VOM, except that they involve the families of the victim and the offender in the mediation process. This is largely based on the New Zealand

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<sup>208</sup> Muntingh L.M, "The Effectiveness of Diversion Programs- A Longitudinal Evaluation of Cases"

<sup>209</sup> Ibid

Model. The VOM takes form of a face-to-face meeting between the victim and the offender giving them the opportunity to meet and work out a mutually acceptable agreement with the assistance of a mediator (from NICRO) with the objective of conciliation. Once an agreement is reached, the prosecutor is informed and the contract is then monitored by NICRO.

The Journey is a program directed at more high risk juveniles and involves at least one residential workshop utilising high impact material. It involves three main phases: (i) separation, (ii) transition and (iii) reintegration. It teaches and focuses on life skills training, adventure (indoor and outdoor) education and vocational skills training. "High risk juveniles" often refer to offenders who are drop outs with previous convictions. The Journey usually is between 3 and 12 months in duration. According to Van Eden, *'the ritual allows for a metaphorical experience that marks transition in the life of the young person and is intended to motivate real transformation'*.<sup>210</sup>

Lastly, there is SAYSTOP, which is directed to towards sexual offenders<sup>211</sup>.

Some of the criteria for diversion included in Part 7 of the Public Prosecutors Policy Documents are, that they admit guilt; first time offenders in the majority of cases; takes responsibility; fixed address; voluntary and between the age of 12-18- if a juvenile<sup>212</sup>.

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<sup>210</sup> Van Eden K. 1997, Rites of Passage Programs as an Alternative to Sentencing for Young People At-Risk in South Africa . Circles on the Mountain, Summer.

<sup>211</sup> SAYSTOP was implemented 1997.

<sup>212</sup> "Solutions and Recommendations to Prison Overcrowding" Portfolio Committee of Correctional Services 2004 available at [www.nicro.org.za/cspri/Publications](http://www.nicro.org.za/cspri/Publications) (accessed on 6 January 2005).

### 9.3 Saturday Court and Additional Court Projects

Saturday and Additional Courts Project was established as an interim and emergency measure to keep the outstanding court rolls under control and greatly assisted in ensuring that cases were more speedily heard this reducing the amount that prisoners spent in prison before sentencing.

Before the end of September 2004, the project had 109 courts in session on Saturdays plus 68 Additional courts. A total of 75 214 cases have been finalized on this project since its implementation in 2001<sup>213</sup>. These courts have, however, finalized less cases during 2003/04 (23 649 cases) than in the previous year (29 969 cases). The reason for this was the scaling down of less courts and the court rolls became more manageable and it became too expensive. Since then the project was canceled (as from September 2004) due to a lack of funding and abuse of the project with regards to staff overtime payments by the Department of Justice and Constitutional Development<sup>214</sup>.

### 9.4 Legislation

#### 9.4.1 Minimum Sentence Legislation

It has been argued by Judge Fagan that minimum sentence legislation should not be renewed. It was brought in as a temporary measure in order to combat crime. What it primarily does is shift ones attention away from the real problems, such as sources of crime; poverty; unemployment and education, to list a few. The money used to incarcerate these prisoners for such a long period of time could be used in upliftment programmes and social welfare. The latest figures produced by the SAPS indicate a considerable reduction in crime and

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<sup>213</sup> "Solutions and Recommendations to Prison Overcrowding" Portfolio Committee of Correctional Services 2004 available at [www.nicro.org.za/cspri/Publications](http://www.nicro.org.za/cspri/Publications) (accessed on 6 January 2005).

<sup>214</sup> Ibid

there is accordingly no justification for extending the legislation<sup>215</sup>. While the long sentences are not achieving it's aim of reducing crime, they are, on the contrary, causing more crime, by turning prisons into places where criminality is nurtured.

Long sentences also make reintegration back into the community more difficult as contact with families tends to be lost.

#### 9.4.2 Correctional Services Act 111 of 1998

According the office of the Inspecting Judge the Act should be amended deleting the provisions that make parole more difficult or a longer wait, ie the provision that dictates that the prisoner would need to serve half of the sentence before consideration for parole, he suggests that this should be left up to the DCS to regulate as was done in the past.

Further provisions, such as the 25-year period before consideration for parole of those serving life imprisonment and the requirement that a court should consider parole for life prisoners should be deleted as well as restoring the National Council for Correctional Services as the appropriate body to monitor (as was in the case of the former instance)

Lastly, it recommends deleting the four-fifths requirement for those sentenced in terms of the minimum sentence legislation<sup>216</sup>.

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<sup>215</sup> Judicial Inspectorate of Prisons- Office of the Inspecting Judge Prisons & Prisoners- Annual Report 2004/2005



## 10. Conclusion

As has been shown above, there have many positive changes in both law and policy and practice in terms of which prisoners are held in detention. For the most part, the new legal framework has allowed for a shift in focus from retributive punishment to that of the protection of rights and duties of prisoners. This new focus have provided a platform from which to build a new prison system that conforms to the new standards set by our Constitutional democracy based on human dignity, equality and freedom.

The Interim Constitution of 1993 and its successor in the form of the final 1996 Constitution have been the main catalyst for this change and it goes far in recognising the injustices of the past as well as aiming to *'heal the divisions of the past and establish a society based on democratic values, social justice and human rights'* and provide a basis whereby every citizen will be equally protected by the law.<sup>217</sup> The Constitution, in its counter majoritarian role in the protection of minorities is more vocal in the support of inmate's than most other texts of its comparative stature. The Constitution further helps to addresses the common misconception that individuals in detention have forfeited their rights as individuals and sometimes their right to human dignity.

The purpose of the Correctional Services Act<sup>218</sup> is explicitly to give *"effect to the Bill of Rights in the Constitution, 1996, and in particular its provisions with regard to prisoners"*. The Act therefore contains Parliament's interpretation of prisoners' constitutional rights and gives expression to the statutory implications of these rights.

In regard to the legislative objective of the implementation of prison sentences, the Act is clear. It states:

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<sup>216</sup> Ghastly Prison overcrowding presents huge problems” Without Prejudice May 2005 at 22-23

<sup>217</sup> Section 1 Constitution of South Africa

<sup>218</sup> Correctional Services Act 111 of 1998

*"With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future<sup>219</sup>".*

The Act also stands in opposition to a strand of common law developed under apartheid. In 1979, the Appellate Division stated that the deprivations of imprisonment *"were intended, so that imprisonment may have some deterrent effect, not only in so far as the prisoner himself is concerned, but also in so far as other persons might contemplate engaging in criminal conduct"*<sup>220</sup>.

However, there has been no evidence to show that the increase in length of sentences has had any significant deterring effect on would-be offenders. Van Zyl Smit notes, in his article titled "Swimming against the Tide" that:

*"there is no certainty no evidence empirical or even anecdotal, to suggest that increasing sentences from, say, six to eleven years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would have risked"*<sup>221</sup>.

It is the certainty of detection and punishment, not the severity of the punishment that is the real deterrent<sup>222</sup>.

This was confirmed in the rigorous survey on the subject, was published by a group of Cambridge University criminologists (1999) in a comprehensive analysis of every statistical study conducted on the

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<sup>219</sup> Section 36, Ibid.

<sup>220</sup> Goldberg and others v Minister of Prisons and others, AP, 1979(1), SALR, 38D.

<sup>221</sup> Van Zyl Smit "Swimming Against the tide" in Dixon & Van der Spuy (eds) Justice Gained? Crime and Control in South Africa's Transition UCT Press (2004) at 248

<sup>222</sup> Dissel A and Ellis S, Reform and Stasis: Transformation in South African Prisons -Paper first published in "Ambitions réformatrices et inertie du social dans les prisons sud-africaines", Critique Internationale No. 16, July 2002, also found at <http://www.csvr.org.za/papers/papadse.htm> (accessed on 6 June 2005)

relationship between sentencing and deterrence since the early 1970s, the authors conclude that:

*The most comprehensive available studies ... generally show significant negative relationships between likelihood of conviction and crime rates — over a ten-year period, for England, the USA and Sweden, and over a fifteen-year period for England and the USA. This comports with findings of earlier research... The statistical associations between severity of punishment and crime rates are considerably weaker, however...the negative correlations between sentence severities and crime rates during periods studied generally are not sufficient to achieve statistical significance<sup>223</sup>.*

Van Zyl Smit further argues that more than a legal enabling environment is required for effective transformation to occur in South African prisons. He notes that in the past, recognition of prisoners rights to humane treatment in prison occurred gradually and only because political prisoners took legal action against the apartheid state. He suggests that Constitutional ideals might only be fully implemented when prisoners begin to enforce their rights through legal means<sup>224</sup>.

Yet despite all the legislative and structural changes that have already been made to date, gross human rights violations still exist within South African prisons. Huge prisoner numbers are overwhelming the capacity of the DCS, making it very difficult to ensure that basic rights and needs of prisoners are met. One of the most immediate concerns is the problem relating to overcrowding. The main problem as noted above, is that there are too many detained people and not enough of

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<sup>223</sup> Von Hirsch A, Bottoms A, Burney E and Wikström P.O, *Criminal Deterrence and Sentence Severity: an analysis of recent research*, (Oxford and Portland Oregon: Hart, 1999) at 45 op cit note 37.

<sup>224</sup> Dissel A and Ellis S, Reform and Stasis: Transformation in South African Prisons, Paper first published in "Ambitions réformatrices et inertie du social dans les prisons sud-africaines", [Critique](#)

them are being released. Further Government is vague about the impact this has on both the DCS as well as the inmates, themselves.

It follows that as it stands the prison system is not only violating fundamental human rights but also not deterring would be offenders from crime.

It is clear that the prison system is in dire need of sustainable effort. Building more prisons may be a short term answer to the problem, but the real problem solution seems to lie in long term resolve which need long term commitments to be viable.

The quote '*The level of society's civilisation can be judged by the state of its prison*'<sup>225</sup> is fitting yet worrisome for South African society if found to be true. We live in a society governed by an admirable Constitution which challenges its citizens to help create a society which respects the rights of all no matter their race, creed or circumstance. In terms of the prison system the responsibility falls heavily onto government with pressure from the judiciary, media, academic, business and community groups to fulfil its obligations to uphold the basic human rights of prisoners. Whilst there has been a significant evolution in the advancement of prisoners' rights in this country, the revolution must yet begin to ensure their full protection as envisioned by the Constitution.

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